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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-5187

Phillip Jerome Lee,

Petitioner,

v.

United States of America,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Conrad Kellenberg
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University of Notre Dame
Law School
Notre Dame, Indiana 46556

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IN THE SUPREME COURT OF THE UNITED STATES

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Phillip Jerome Lee,

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United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Phillip Jerome Lee respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case (No. 75-1836) on July 21, 1976.

OPINION BELOW

The opinion of the court of appeals has not as yet been reported. A copy of that opinion is included as Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was denied due process.
2. Whether the petitioner was twice put in jeopardy.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;... nor be deprived of life, liberty or property, without due process of law...."

STATEMENT OF THE FACTS

The petitioner, Phillip Jerome Lee, was brought to trial on July 16, 1974, in the United States District Court for the Northern District of Indiana, Fort Wayne Division, for the alleged robbery of Charles Bilskie (Billskie) on December 21, 1973. A bench trial was held, at the beginning of which the petitioner moved for dismissal of the information because it failed to allege that the offense was committed knowingly and with the intent to deprive the owner of the use and benefit of the property.

The District Court judge took this motion under advisement and proceeded to hear the United States Attorney's entire case. The petitioner again made a motion to dismiss and then rested. After stating that there was no doubt in his mind as to the petitioner's guilt, the District Court judge dismissed the information because of the defect appearing on its face, stating, "No such allegation is contained, no matter how I stretch my imagination when I read the information. There is nothing here that smacks of an element of intent." (Transcript of Trial on July 16, 1974, pages 67-68).

On September 25, 1974, a Grand Jury returned an indictment charging the petitioner with the same crime concerning the same event. The petitioner was arraigned before the same District Court judge, who then disqualified himself because of his earlier comments concerning the petitioner's guilt. On June 23, 1975, the petitioner was tried in a bench trial before another District Court judge and found guilty.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS WAS VIOLATED BY THE ACTIONS OF THE UNITED STATES ATTORNEY AND THE DISTRICT COURT JUDGE.

The petitioner was brought to trial the first time under an information that was defective on its face. His lawyer moved immediately to dismiss the information for that reason. The United States Attorney declined to amend it, and the District Court judge was determined to proceed. The trial continued through the presentation of all the evidence. At the end of the case the trial judge dismissed the information because of the defect on its face.

In this situation, the United States Attorney should have asked leave to amend the information before the cause was pursued through the presentation of all the evidence. When the United States Attorney failed in that duty, the trial judge should have dismissed the information.

Instead of so acting, they allowed the petitioner to sit through the psychological trauma of a complete trial. As far as the petitioner was concerned, he was being tried for robbery in a Federal court; he suffered all the fear and anxiety that attend such a proceeding for a defendant. This course of action by the United States Attorney and by the District Court judge must be considered an abuse serious enough to have violated petitioner's Fifth Amendment right to due process of law.

II. THE SECOND TRIAL FOR THE SAME ALLEGED OFFENSE VIOLATED THE PETITIONER'S FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY.

Despite the fact that the original information was defective, the cause was pursued twice to the conclusion of all

the evidence. After he had heard all the evidence, the trier of fact, the District Court judge, went so far as to conclude and state that on the evidence presented he had no doubt as to the defendant's guilt. He then dismissed the case because he considered the information defective. The judge later considered his comment as to the defendant's guilt sufficient to disqualify himself from a second trial, and said that he had very serious questions in this case in regard to double jeopardy. (Arraignment, February 6, 1975).

Though there are holdings of this Court to the effect that jeopardy does not attach to a trial based on a faulty charge, it cannot be denied that the petitioner was placed in factual and psychological jeopardy. In the first trial, the petitioner's lawyer immediately moved to dismiss the information as faulty. Neither the United States Attorney nor the District Court judge was willing to agree with this contention. The petitioner, a layman, reasonably expected they would never agree and that their view might--though erroneous--prevail. The crime carried a heavy penalty.

This Court has often expressed a concern that a defendant should not be made to suffer the psychological trauma of a complete trial twice for the same alleged offense. Green v. United States, 355 U.S. 174, 78 S.Ct. 221 (1957).

In Downum v. United States, the jury was impanelled for the first trial but the prosecutor was not ready to proceed. This Court held that the prosecutor's neglect caused jeopardy to attach to that first trial. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963). In United States v. Jorn, the trial judge discharged the jury in the first trial over the defendant's objection because the judge thought that the witnesses had not been properly warned of their rights. This Court held that such an abuse of discretion by the judge caused jeopardy to attach to

that first trial. United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547 (1971). In United States v. Jenkins, the District Court judge dismissed the indictment, before any evidence was heard, for reasons other than a finding of guilt or innocence. This Court held that jeopardy attached to that trial, stating that "it is enough for purposes of the Double Jeopardy Clause,...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006 (1975).

The petitioner claims that his first trial was similar to the first trials in the above-mentioned cases because of the neglect of the United States Attorney in failing to amend the information, because of the abuse of discretion by the District Court judge in pursuing the trial to the end of the case, and because the first information was dismissed for reasons other than a factual determination of guilt or innocence.

The petitioner claims that in his situation jeopardy attached to his first trial, and that a second prosecution amounted to a violation of his Fifth Amendment protection against double jeopardy.

CONCLUSION

The events in this series of trials deprived the petitioner of due process of law and also subjected him to double jeopardy, both in violation of the Fifth Amendment. Therefore, the petitioner requests that certiorari be granted and that his conviction be reversed.

Respectfully submitted,

Conrad Kellenberg
Counsel for Petitioner
University of Notre Dame
Law School
Notre Dame, Indiana 46556

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1836

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILLIP JEROME LEE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. F-Cr-74-83
ROBERT A. GRANT, *Judge.*

ARGUED JANUARY 21, 1976 — DECIDED JULY 21, 1976

Before SWYGERT and BAUER, *Circuit Judges*, and HOFFMAN, *Senior District Judge.*[1]

PER CURIAM. The question presented on this appeal is whether the double jeopardy clause of the Constitution is violated when a person is put to trial twice, the first time on a faulty charge.

The evidence at both trials was identical. Charles Bilskie, a blind person, operated a newspaper and candy concession in the main lobby of the Fort Wayne, Indiana, Post Office. On December 21, 1973 Bilskie had placed his two wallets

[1] The Honorable Julius J. Hoffman, United States Senior District Judge for the Northern District of Illinois, sitting by designation.

containing money in the amount of $66.00 on the counter behind his stand. A postal security officer, Vance Travis, was in the lobby during the day and saw two people talking to Bilskie. One of these was later identified as defendant-appellant Phillip Jerome Lee. Officer Travis saw Lee go behind the counter and after noticing that Lee had Bilskie's wallets in his hand, shouted, "Stop." Lee attempted to escape, but was apprehended by Travis.

The defendant was charged by an information with violating 18 U.S.C. § 13[2] and I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971),[3] (theft while on property under the jurisdiction of the federal government). At his trial, but before any evidence was introduced, the defendant moved that the information be dismissed because it did not include the allegation that the offense was "knowingly" committed. The trial judge took the motion under advisement and proceeded to hear the evidence. At the conclusion of the trial the objection to the faulty information was sustained and the case was dismissed.

The defendant was thereafter indicted for the same offense with the correction that the theft knowingly occurred. After a bench trial, the defendant was found guilty and given a prison sentence.

The sole issue on appeal is whether a retrial of the defendant for the same offense pursuant to a corrected indictment violated his right against double jeopardy.

Recently, in *Serfass* v. *United States*, 420 U.S. 377, 388 (1975), the Supreme Court discussed at what point in a criminal proceeding the double jeopardy clause becomes applicable:

[2] 18 U.S.C. § 13 reads:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

[3] I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971), reads:

Theft in general.—A person commits theft when he (1) knowingly: (a) obtains or exerts unauthorized control over property of the owner; . . .

BEST COPY AVAILABLE

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." (Citations omitted.)

The question, however, of when double jeopardy attaches should not be determined mechanically, as the Court pointed out in *Illinois* v. *Somerville*, 410 U.S. 458 (1973). Rather the question must turn on the particular facts presented by each case. For example, in *Somerville*, the defendant had been indicted for the crime of theft. The case was called for trial and a jury was impaneled and sworn, but before any evidence had been presented the prosecuting attorney brought to the trial court's attention the fact that the indictment was fatally defective. Because the defect was "jurisdictional" under the prevailing state law and could not be waived, the trial judge granted the state's motion for a mistrial. The defendant was reindicted (under proper allegations) for the same offense and a jury returned a verdict of guilty. The Supreme Court held that the double jeopardy clause did not bar the defendant's retrial.

In *United States* v. *Valazquez*, 490 F.2d 29 (2d Cir. 1973), the trial judge dismissed an indictment after he had examined defendant's pretrial motion papers containing allegations of facts going to the issue of guilt or innocence. The allegations were disputed by the Government. It appealed under 18 U.S.C. § 3731, and the defendant pleaded double jeopardy. The Second Circuit allowed the appeal and held that double jeopardy had not been invoked even though the trial court had gone beyond the allegations of the indictment and had con-

sidered evidentiary facts, though not, as the court emphasized, in an adversary trial setting.

In the case at bar, the motion of dismissal was made by the defendant on the day of trial. The dismissal was granted after the evidence was heard, but before any finding was made of guilt or innocence. It was not based on evidence adduced at trial, but rather on the failure of the information to state an essential element of the offense—in short, because of a jurisdictional defect. Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial. Under these circumstances, we conclude that the double jeopardy clause did not bar his retrial.

Double jeopardy does not attach when a defendant secures a reversal of his conviction because of a faulty indictment and after remand he is tried on a new indictment for the same offense. *United States* v. *Ball*, 163 U.S. 662 (1896). There is a certain analogy between this case and the one before us. Had Lee's motion to dismiss been denied and had he been found guilty, his appeal would likely have resulted in a reversal and a remand for retrial. Under *United States* v. *Ball, supra*, a new trial would not constitute double jeopardy.

For these reasons, the conviction is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5187

PHILLIP JEROME LEE,
Petitioner,

—*v.*—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 9, 1976
CERTIORARI GRANTED JANUARY 10, 1977

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5187

PHILLIP JEROME LEE,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Criminal Docket—FCR 74-3

THE UNITED STATES

v.

PHILLIP JEROME LEE

DOCKET ENTRIES

DATE	PROCEEDINGS
2-6-74	1. U.S. Atty. files information, pls
2-6-74	2. U.S. Aty files petition for writ of habeas corpus ad prosequendum
2-6-74	3. Writ of Habeas corpus ad prosequendum entered by the court. Copies handed to U.S. Marshal, Fort Wayne and to U.S. Atty. pls
2-7-74	4. Def. Phillip Jerome Lee in court without counsel. Court to appoint an attorney. mb
2-8-74	4a. Fergus Kear appointed counsel. CJA to A.O. pls
2-18-74	5. Official Court Reporter files record of proceedings for the date Feb. 7, 1974. mb
2-13-74	6. Writ of Habeas Corpus Ad Prosequendum returned executed 2-6-74. mb
3-4-74	7. Petition for writ of habeas corpus ad prosequendum filed. mb

DATE	PROCEEDINGS

2-4-74 8. Writ of habeas corpus ad prosequendum entered. (SE) Eschbach. 2 copies to Marshal, copy to U. S. Attorney 3-4-74. mb

3-12-74 9. (ARRAIGNMENT) Def. appearing for arraignment in person and with counsel Fergus Kear. Gvt. present by John Wilks, U.S. Atty. Def. arraigned and pleads not guilty. R. Grant, Judge. pls

3-15-74 10. Writ of habeas corpus ad prosequendum returned executed 3-12-74.

3-26-74 11. Official Court Reporter files record of proceedings for the date March 12, 1974. mb

5-23-74 12. Fergus M. Kear files Motion for Leave to Withdraw. Cert. of Serv. slm

5-24-74 13. Pursuant to motion filed 5-23-74, motion granted and court-appoints counsel, Fergus Kear, is now withdrawn. This court now appoints Donald C. Swanson, Esq. as counsel for def. Clerk of this court is directed to enter an order on CJA Form 20 appointing Mr. Swanson. This cause is now set for jury trial on Tuesday, July 16, 1974, at 9:30 a.m. U.S. Atty. is directed to submit to this court a writ of habeas corpus ad prosequendum returning def. to Allen County Jail no later than July 3, 1974. (SE) Eschbach, Judge. Copy to John R. Wilks, U.S. Atty., Fergus Kear, Donald C. Swanson and to Def. Phillip Jerome Lee 5-24-74. slm

5-24-74 14. Trial notice mailed to John R. Wilks, U.S. Atty. and Donald C. Swanson, slm

5-24-73 15. CJA Form 20 appointing Don Swanson attorney for defendant forward to A.O. pls

6-13-74 16. CJA Form 20 for attorney Fergus Kear approved in amount of $106.00 and forwarded to A.O. pls

6-25-74 17. U.S. files petition for writ of habeas corpus ad prosequendum. mb

DATE	PROCEEDINGS

6-25-74 18. Writ of habeas corpus ad prosequendum entered. (SE) Eschbach. Copies to U.S. Marshal and U. S. Attorney, J. Wilks 6-25-74. slm

7-12-74 19. Defendant files waiver of right to trial by jury. mb

7-12-74 20. Indigent defendant's motion for costs of service of supoenas and witness fees filed. mb

7-12-74 21. Consent to court trial filed. Cert. of serv. mb

7-15-74 22. Order entered. (SE) Eschbach. Trial of the captioned matter will now be to the court without a jury pursuant to Waiver and consent filed. Copy to U. S. Attorney, John Wilks and Donald C. Swanson 7-15-74. mb

7-15-74 23. Order entered. (SE) Eschbach. Pursuant to indigent defendant's motion, court orders the U.S. to provide monies necessary for cost of service of subpoena and witness fees. Copy to U.S. Marshal, U.S. Attorney and Donald Swanson 7-15-74. mb

7-16-74 24. 9:30 a.m. Cause for trial to the court. Gvt. by Frank Gray, AUSA. Defendant in person and with counsel Donald Swanson, Jr. Government presents opening statements. Defense motion to dismiss information and argument presented. Motion denied at this time but will be taken under advisement. Defense presents opening statements. Government presents evidence, concludes and rests. Defense presents motion for judgment of acquittal. Motion denied. Defense presents no evidence. Both sides rest. Court dismisses this cause of action because the information is improperly drafted. Eschbach, Judge. pls

8-1-74 25. Official Court reporter files record of proceedings for the date July 16, 1974. mb

8-1-74 26. CJA Form 20 approved in amount of 400.00 and forwarded to A.O. pls

7-30-74 Writ of habeas corpus ad prosequendum returned fully executed. mb

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FCR 74-3

[Filed Feb. 6, 1974]

UNITED STATES OF AMERICA

v.

PHILLIP JEROME LEE

Title 18, Section 13, U.S.C.
& Section 10-3030 Burns Indiana
Statutes

The United States Attorney charges:

On or about the 21st day of December, 1973, at the United States Post Office, Fort Wayne, Indiana, in the Northern District of Indiana, on land acquired for the use of the United States and under the exclusive jurisdiction thereof, PHILLIP JEROME LEE did take and steal two billfolds containing $66.00 from Charles Bilskie in violation of Title 18, Section 13, United States Code and Section 10-3030 Burns Indiana Statutes.

/s/ John R. Wilks
JOHN R. WILKS
United States Attorney

BURNS INDIANA STATUTES—Section 10-3030

II. THEFT

— IC 35-17-5-3 —

10-3030. Theft in general.—A person commits theft when he (1) knowingly:

(a) obtains or exerts unauthorized control over property of the owner; or

(b) obtains by deception control over property of the owner or a signature to any written instrument; or

(c) alters, replaces, transfers or substitutes without authorization of the owner any label, price tag or price marking upon any property or merchandise displayed or offered for sale by any mercantile establishment, as defined by IC 1971 35-3-2-4(c) [subsection (c) of § 10-3045]; or

(d) transfers without authorization of the owner any property or merchandise displayed or offered for sale by any mercantile establishment, as defined by IC 1971, 35-3-2-4(c) [subsection (c) of § 10-3045] from the package, bag or container in or on which such product or merchandise is displayed, to any other package, bag, or container; or

(e) obtains by threat control over property of the owner or a signature to any written instrument; or

(f) obtains control over stolen property knowing the property to have been stolen by another, which knowledge may be inferred from the possession of such stolen property, wherever the theft may have occurred; or

(g) brings into this state property over which he has obtained control by theft, wherever the theft may have occurred; and

(2) either:

(a) intends to deprive the owner of the use or benefit of the property; or

(b) intends to deprive the owner of some part or all of the value, which value and ownership shall be inferred from the price tag or price marking on such merchandise or property, of any property or merchandise

displayed or offered for sale by any mercantile establishment as defined by IC 1971, 35-3-2-4(c) [subsection (c) of § 10-3045]; or

(c) uses, conceals or abandons the property in such manner as knowingly to deprive the owner of such use or benefit; or

(d) uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of such use or benefit. [Acts 1963 (Spec. Sess.), ch. 10, § 3, p. 10; 1971, P. L. 458, § 1, p. 2096.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

[Title Omitted in Printing]

EXCERPTS FROM TRIAL TRANSCRIPT—July 16, 1974

* * * *

[2] PROCEEDINGS

(Court opened at 9:30 a.m.)

THE COURT: Good morning, Gentlemen.

MR. GRAY: Good morning, Your Honor.

THE COURT: Gentlemen, this is the bench trial in FCR 74-3, United States of America against Phillip Jerome Lee. Is the Government ready for trial?

MR. GRAY: Yes, Your Honor.

THE COURT: Does either side wish an opening statement?

MR. GRAY: I would like to make a brief comment, Your Honor.

THE COURT: Very well.

MR. GRAY: Your Honor, the Information that is before the Court today involves the violation of Federal land of a state statute involving the general theft statute of the laws of the State of Indiana, and the Government maintains that the proof to be submitted will substantiate the charges that have been filed in this matter, in that the taking of wallets from Charles Bilskie, the blind vendor, by the Defendant obtained unauthorized control over his property, and also that the stealing would be shown by the evidence that he intended to deprive Mr. Bilskie of the use of the property.

The charge, as indicated in the Information filed, [3] will show that $66 which was contained in the two wallets owned by Mr. Bilskie was taken by Mr. Lee, and that Mr. Lee was apprehended in the course of attempting to escape once he had taken these bill folds from Mr. Bilskie.

THE COURT: Mr. Swanson, do you wish an opening statement, sir?

MR. SWANSON: Your Honor, before I make a brief opening statement, I realize this is probably a little bit out of order, but I think it should be considered by the Court at this time.

I would like to make a motion to dismiss this Information. I was in this case after the time had passed for such a motion to be made, and I think that the Court should consider what I have to say in the interest of justice.

THE COURT: Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them. So I will hear you, but you have that problem.

MR. SWANSON: Okay, Your Honor. I would like to respectfully point out to the Court that the Federal statute involved points the Court back to the state law of theft, Burns, Section 10-3030. Burns, Section 10-3030, [4] has two sections. One is seven elements for an offense and the second one four elements or offenses. Now in the Information there is no indication as to which specific offense he is charged with.

Secondly and in conjunction with that first point, the sum of 11 offenses or charges deprives my client of due process and doesn't give him proper notice as to what charges to defend against.

THE COURT: You mean that the statement in the Information that Phillip Jerome Lee did take and steal two bill folds containing $66 from Charles Bilskie, is not a specific enough charge to know what you are defending against?

MR. SWANSON: What I am saying in the Information, sir, that Burns Section 10-3030 with which he is charged, there is no specific section in the Information.

THE COURT: I know, but there is specific language. I think you are referring to the fact that the particular

subsection of sub-paragraph of 3030 is not cited, is that your reference?

MR. SWANSON: Yes.

THE COURT: Well, I think that certainly would be taken care of by the specificity of the Information itself.

MR. SWANSON: Okay. My second point now in my motion to dismiss the Information is that the Information fails to [5] recite that the alleged offense was committed knowingly. In Burns Section 10-3030 that is an essential element of the crime that it was done knowingly. Both sections refer to a knowing and specific intent crime, and there is law, Your Honor, that states that if the Information of Indictment under this section and specific intent is not set out in the Information, then the Information must be dismissed. That law case cited is Miller versus State, 250 Indiana 338, 236 NE2d 173.

THE COURT: Anything further?

MR. SWANSON: Yes, there is one further point. The Information also fails to state that my client intended to deprive the owner permanently of the articles alleged to be stolen.

THE COURT: Well, since I have had no opportunity to study this at all, I will deny the motion at this time, but at my first opportunity I will check your citation and give consideration as appears to be warranted.

Is there anything further by way of opening statement?

MR. SWANSON: Yes, Your Honor, I would like to make a few remarks at this time.

THE COURT: Very well.

MR. SWANSON: It is our position, of course, that Phillip Lee, charges with this offense, denies his guilt. [6] We believe the evidence will show that there were two people on the day in question, himself and one Bruce Anderson. It will be our position, and I believe the evidence will bear us out, that if something was stolen on this date that Bruce Anderson was in fact the culprit in the matter.

That is about all I have to say in opening statement, Your Honor.

THE COURT: All right, Mr. Gray, you may proceed with the Government's case.

MR. GRAY: Thank you, Your Honor. Prior to introducing the first witness, the parties to have a stipulation.

THE COURT: You have a stipulation?

MR. GRAY: Yes, Your Honor. It is my understanding after talking with Counsel for the Defendant the element of the Information relating to the fact that this act, if any act took place, in the United States Post Office, Fort Wayne, Indiana, Northern District of Indiana, did in fact take place on land acquired for the use of the United States, and under the jurisdiction thereof.

THE COURT: Is that so stipulated, Mr. Swanson?

MR. SWANSON: Yes, Your Honor, that is correct.

THE COURT: That means the exclusive use, which was exclusive use as of the date alleged in the Information, that would be December 21, 1973; is that correct, Gentlemen?

[7] MR. SWANSON: Yes, sir.

MR. GRAY: That is right.

THE COURT: All right, you may proceed.

MR. GRAY: Your Honor, the Government would call as its first witness Mr. Vance Travis.

Whereupon,

VANCE W. TRAVIS,

was called as a witness by and on behalf of the Government, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Gray:

Q. State your name to the Court?

A. Vance W. Travis.

Q. Would you speak up just a little bit, Mr. Travis, so Mr. Swanson can hear you? What is your age?

A. 53.

Q. And what is your occupation?

A. I am a security police officer with the United States Postal Service.

Q. What are your duties in your position?

A. Well, our duties consist of court room protection and plant protection within the building and without.

Q. By building, which building are you referring to?

A. The United States Court House and Post Office

* * * *

[64] THE COURT: Very well. The recess is granted and we will take a fifteen minute recess. How many witnesses will you have, do you know, Mr. Swanson?

MR. SWANSON: We have subpoenaed one, Your Honor.

THE COURT: All right.

(A recess was taken.)

THE COURT: You may proceed, Mr. Swanson.

MR. SWANSON: Your Honor, at this time I would like to make a defense motion for judgment of acquittal. We feel that the prosecution has failed to set out a prima facie case of theft under Burns Annotated Statutes, Section 10-3030, in that the prosecution has failed to establish the requisite intent, the intent to deprive the owner permanently of the articles allegedly stolen; and, two, that the prosecution has failed to establish that possession of the billfolds were ever in the Defendant. They talked around the subject but it has never been affirmatively set out that they were in the possession of the Defendant. I know there was testimony by the officer that he saw an object in the Defendants hand—

THE COURT: He didn't say object. He said he saw the wallets in the Defendant's hand, Mr. Swanson. I invite your attention to the record, but let's stay with it Are you talking now about the Government's proof or are you talking about the Government's charge? If you are talking [65] about the proof—

MR. SWANSON: I thought Your Honor had overruled my motion.

THE COURT: I said I had to defer it at that time until I could do some research on it, your original motion to dismiss, because you made it when I came on the bench to start the trial; is that not a correct statement of the record?

MR. SWANSON: Yes, sir.

THE COURT: And I reserved the right to do some research. Now we are talking about your motion as your motion is addressed to the proof.

MR. SWANSON: Yes, Your Honor.

THE COURT: You made the statement that there was a vague reference to something in the Defendant's hand. My recollection of Officer Travis' testimony was that he saw the billfolds in the Defendant's hand. I think that is sufficient possession, unless you are saying that he didn't hold them in his hand long enough.

MR. SWANSON: What I am saying, Your Honor, is that the officer testified, and I stand corrected, that he saw the wallet in the hand of the Defendant and he did not say two wallets, he said a wallet in the hand of the Defendant.

THE COURT: And then he indicated how thick that was.

[66] MR. SWANSON: Yes, that is correct.

THE COURT: And he said about three inches, and as I recall Government's Exhibit 1, that just about measures out.

MR. SWANSON: That is correct, Your Honor. He also testified that he at no time took possession of the wallets. He saw them on the floor and indicated their where abouts to the owner, Mr. Billskie, but at no time did he take possession of the wallets, that the only time he saw these particular wallets was today.

THE COURT: Oh, I don't believe that is a correct statement of the record, either.

MR. SWANSON: Okay.

THE COURT: He said he didn't take possession but he had seen those wallets at other times when Mr. Billskie was closing his place of business checking out, I think were his words.

MR. SWANSON: That is correct. Okay. Well, my point is that the wallets, we do not feel that the Defendant has been shown to have been in possession of the wallets. So that is about all I can say.

THE COURT: Well, I think the evidence, and we are dealing now with what the evidence is, I think the evidence is clear that they were in the possession of the defendant and has been established certainly in a sufficient [67] degree to withstand a motion which now, as I understand it, is directed to the Government's proof?

MR. SWANSON: Yes, Your Honor.

THE COURT: You may proceed with the defense.

MR. SWANSON: Your Honor, we had subpoenaed one witness today. However, in conversations with my client, both myself and my client feel that this witness is a non-material witness and hence we rest our case.

THE COURT: Defense rests.

Now, Mr. Swanson, we will come back to your motions. Your motion addressed to the Government's proof borders on being frivolous. Your client has been proven beyond any reasonable doubt in the world, there is no question about his guilt; none whatsoever.

The great grevious part to me is that I must dismiss this case because the Information was improperly drawn. Whoever drew it up didn't even look at the Indiana Statute, but my responsibility under my oath, regardless of how I might condemn this man's conduct, and I do, sir, not your, your clients, I have to dismiss.

The briefest examination of the statute establishes that knowingly is an offense. Also under most of the sections which do not use knowingly there is an element that requires either intent to deprive the owner permanently of use and benefit of the property, or using such property in such a [68] manner as knowingly deprives the owner. No such allegation is contained, no matter how I stretch my imagination when I read the Information. There is nothing in there that even smacks of an element of intent.

So next I come to the question of, this is a Federal case, is the law any different in the Federal Court and where we are applying a state statute, which was the

situation here. The Federal law cases are legion that the sufficiency of the charges is dependent upon its containing the allegations of all of the elements, and all of the elements here are established by the state statute.

As much as I dislike doing so, I have no alternative but to grant your original motion of dismissal and the charge is dismissed.

Mr. Gray, I am not condemning you, I don't know who drafted it, but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course. You may carry that complete message back to your department.

Court is in recess.

(Court recessed at 11:24 a.m.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[Title Omitted in Printing]

EXCERPTS FROM TRIAL TRANSCRIPT—June 23, 1975

* * * *

[88] I will submit to the Court that every element referred to in the Indictment has been proven, and that the defendant has been proven guilty beyond a reasonable doubt both of the violation of Title 18 Section 13 of the Code and the general theft statute of the Burn's Code Section 10-3030.

THE COURT: Mr. Meessen?

MR. MEESSEN: Your Honor, I have nothing further at this time.

THE COURT: At the outset I conclude and stress the wish that all of the decisions that I have to make were as clear to the Court as this one. There is [89] no doubt in the Court's mind beyond any reasonable doubt that this defendant is guilty, and the Court so finds that he is guilty.

All of the elements of the offense are there. I imagine that if the information that is presented here—which I gather from the way the prosecutor followed the transcript was probably about the same as it was in the other trial—thus it came as no surprise to this defendant.

By the way; is that true, Mr. Gray?

MR. GRAY: I'm sorry, Your Honor. Were you discussing the transcripts from the first case?

THE COURT: Yes. That is, did the evidence generally follow what was presented before?

MR. GRAY: Yes.

THE COURT: I gather that if the evidence that was presented here and a repeat of what was done before was not the way it happened, that this defendant's sister might have been here to testify to the contrary. At least, there is no [90] showing that she was unavailable or couldn't come. There's no reason at all why this

Court should not find that, and we do now find, beyond any doubt, that this defendant is guilty as charged in this Indictment.

We will set this matter for the 30th of July at 11:00 a.m. for final sentencing.

What is the bond arrangement under which this defendant is at liberty?

MR. GRAY: Your Honor, I believe this defendant is at liberty under a $1,000 OR Bond, which, I believe, was made by the magistrate in December of 1974. I do not know whether the defendant has posted any bond. I believe he is out on his own recognizance.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1836

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PHILLIP JEROME LEE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

No. F-Cr-74-83

ROBERT A. GRANT, *Judge*

ARGUED JANUARY 21, 1976—DECIDED JULY 21, 1976

Before SWYGERT and BAUER, *Circuit Judges*, and HOFFMAN, *Senior District Judge*.[1]

PER CURIAM. The question presented on this appeal is whether the double jeopardy clause of the Constitution is violated when a person is put to trial twice, the first time on a faulty charge.

The evidence at both trials was identical. Charles Bilskie, a blind person, operated a newspaper and candy concession in the main lobby of the Fort Wayne, Indiana, Post Office. On December 21, 1973 Bilskie had placed

---

[1] The Honorable Julius J. Hoffman, United States Senior District Judge for the Northern District of Illinois, sitting by designation.

his two wallets containing money in the amount of $66.00 on the counter behind his stand. A postal security officer, Vance Travis, was in the lobby during the day and saw two people talking to Bilskie. One of these was later identified as defendant-appellant Phillip Jerome Lee. Officer Travis saw Lee go behind the counter and after noticing that Lee had Bilskie's wallets in his hand, shouted, "Stop." Lee attempted to escape, but was apprehended by Travis.

The defendant was charged by an information with violating 18 U.S.C. § 13 [2] and I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971),[3] (theft while on property under the jurisdiction of the federal government). At his trial, but before any evidence was introduced, the defendant moved that the information be dismissed because it did not include the allegation that the offense was "knowingly" committed. The trial judge took the motion under advisement and proceeded to hear the evidence. At the conclusion of the trial the objection to the faulty information was sustained and the case was dismissed.

The defendant was thereafter indicted for the same offense with the correction that the theft knowingly occurred. After a bench trial, the defendant was found guilty and given a prison sentence.

The sole issue on appeal is whether a retrial of the defendant for the same offense pursuant to a corrected indictment violated his right against double jeopardy.

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[2] 18 U.S.C. § 13 reads:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

[3] I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971), reads:

> Theft in general.—A person commits theft when he (1) knowingly: (a) obtains or exerts unauthorized control over property of the owner; . . .

Recently, in *Serfass* v. *United States*, 420 U.S. 377, 388 (1975), the Supreme Court discussed at what point in a criminal proceeding the double jeopardy clause becomes applicable:

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." (Citations omitted.)

The question, however, of when double jeopardy attaches should not be determined mechanically, as the Court pointed out in *Illinois* v. *Somerville*, 410 U.S. 458 (1973). Rather the question must turn on the particular facts presented by each case. For examle, in *Somerville*, the defendant had been indicted for the crime of theft. The case was called for trial and a jury was impaneled and sworn, but before any evidence had been presented the prosecuting attorney brought to the trial court's attention the fact that the indictment was fatally defective. Because the defect was "jurisdictional" under the prevailing state law and could not be waived, the trial judge granted the state's motion for a mistrial. The defendant was reindicted (under proper allegations) for the same offense and a jury returned a verdict of guilty. The Supreme Court held that the double jeopardy clause did not bar the defendant's retrial.

In *United States* v. *Valazquez*, 490 F.2d 29 (2d Cir. 1973), the trial judge dismissed an indictment after he had examined defendant's pretrial motion papers containing allegations of facts going to the issue of guilt or

innocence. The allegations were disputed by the Government. It appealed under 18 U.S.C. § 3731, and the defendant pleaded double jeopardy. The Second Circuit allowed the appeal and held that double jeopardy had not been invoked even though the trial court had gone beyond the allegations of the indictment and had considered evidentiary facts, though not, as the court emphasized, in an adversary trial setting.

In the case at bar, the motion of dismissal was made by the defendant on the day of trial. The dismissal was granted after the evidence was heard, but before any finding was made of guilt or innocence. It was not based on evidence adduced at trial, but rather on the failure of the information to state an essential element of the offense—in short, because of a jurisdictional defect. Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial. Under these circumstances, we conclude that the double jeopardy clause did not bar his retrial.

Double jeopardy does not attach when a defendant secures a reversal of his conviction because of a faulty indictment and after remand he is tried on a new indictment for the same offense. *United States* v. *Ball*, 163 U.S. 662 (1896). There is a certain analogy between this case and the one before us. Had Lee's motion to dismiss been denied and had he been found guilty, his appeal would likely have resulted in a reversal and a remand for retrial. Under *United States* v. *Ball*, *supra*, a new trial would not constitute double jeopardy.

For these reasons, the conviction is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 76-5187

PHILLIP JEROME LEE, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 10, 1977

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No. 76-5187

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

PHILLIP JEROME LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 539 F.2d 612.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1976. The petition was filed on August 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who waited until the commencement of trial to challenge a defect in the information against him, was properly tried a second time after the initial information was dismissed upon his motion.

STATEMENT

After a jury-waived trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of theft under the assimilative crimes statute, 18 U.S.C. 13, and I.C. 35-17-5-3, Burns Ind. Stat. 3030. [1/] He was sentenced to five years' imprisonment. The court of appeals affirmed.

The evidence, not in dispute here, showed that Charles Bilskie, who was blind, operated a news stand and candy concession in the lobby of the Fort Wayne, Indiana, Post Office. On December 21, 1973, after Mr. Bilskie had placed his two wallets on a counter behind his stand, petitioner was observed by a postal security officer going behind the counter and taking the wallets. The officer shouted at petitioner, who tried to escape but was apprehended.

The district court convened petitioner's jury-waived trial on July 16, 1974. After the prosecutor presented his opening statement outlining the government's evidence (I, Tr. 2-3), the trial judge invited defense counsel to make his opening statement. Instead, defense counsel moved to dismiss the information against petitioner, in part on the ground that the information was fatally defective for failure to state that petitioner had committed the offense knowingly. The trial court pointed out that petitioner could have raised this motion before the commencement of trial (I, Tr. 3):

> Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of time to research them.

The trial court denied petitioner's motion and proceeded with trial, while agreeing to research the issue raised

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1/ I.C. 35-17-5-3, Burns Ind. Stat. 3030 provides:

> Theft in general -- A person commits theft when he (1) knowingly; (a) obtains or exerts unauthorized control over property of the owner ***.

in the motion and consider it at a later time. Petitioner did not object to the continuation of the trial (I, Tr. 5).

After the government's case, the defense rested without presenting any witnesses. The motion to dismiss was then again considered and the trial court determined that the information was indeed defective for failure to state the element of knowing participation. 2/ Accordingly, the trial court dismissed the information (I, Tr. 66-67). Following this dismissal petitioner was indicted. The indictment charged that petitioner acted knowingly. After a bench trial petitioner was convicted.

Petitioner argued on appeal that the Double Jeopardy Clause barred his second trial. The court of appeals concluded that a dismissal, granted at the behest of defendant and required by a defect in the information, is identical for practical purposes to the mistrial declared in Illinois v. Somerville, 410 U.S. 458, and that the Double Jeopardy Clause accordingly does not bar a second trial in these circumstances.

ARGUMENT

1. This case is controlled by Illinois v. Somerville, 410 U.S. 458. In Somerville, upon the prosecutor's motion made after jeopardy had attached, a mistrial was declared and a defective indictment dismissed. A new indictment was procured, the defendant was tried upon that indictment and

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2/ The trial judge was correct. The Assimilative Crimes Act was intended to establish "complete current conformity with the criminal laws of the respective States in which ***[federal] enclaves are situated" (United States v. Sharpnack, 355 U.S. 286, 293). Under Indiana law, it must be shown that a defendant charged under I.C. 35-17-5-3, Burns Ind. Stat. 3030 knowingly committed the offense. Linnemeir v. State, 330 N.E. 2d 373, 376; Martine v. State, 300 N.E. 2d 128, 131; Monroe v. State, 339 N.E. 2d 102, 103; Trader v. State, 331 N.E. 2d 469; Lay v. State, 329 N.E. 2d 650. The information therefore was required to allege that petitioner committed the crime knowingly. United States v. Debrow, 346 U.S. 374, 376.

convicted, and this Court held that the second trial and conviction was not barred by double jeopardy. Although Somerville had expressly asserted his desire to proceed to verdict with the jury then empaneled, this Court concluded that termination of the first trial over his objection was justified by "manifest necessity" and "the ends of public justice" because the defect in the indictment made it impossible, were the trial allowed to proceed, to procure a valid guilty verdict (410 U.S. at 469). The Court held that under such circumstances "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice" (id. at 471).

Here, as in Somerville, petitioner's first trial was terminated prior to any finding of guilt or innocence because an error in the institution of the proceedings made a valid conviction impossible. 3/ Indeed, petitioner's position is materially weaker than was Somerville's, since, rather than assert his "valued right to have his trial completed by [the] particular tribunal" before which it had commenced (Wade v. Hunter, 336 U.S. 684, 689; United States v. Jorn, 400 U.S. 470, 484), petitioner actually sought to have the proceedings terminated by dismissal of the defective indictment. 4/ In our view, since the principal reason why

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3/ The termination in Somerville was labelled a mistrial rather than a dismissal, but this Court has rejected the notion that the disposition of the double jeopardy question is dependent on the label attached to the termination. See United States v. Sisson, 399 U.S. 267, 290; United States v. Jorn, 400 U.S. 470, 478 n. 7; Serfass v. United States, 420 U.S. 377, 392.

4/ Petitioner's claim (Pet. 4) that the government declined to amend the information when its defect was pointed out is incorrect. Petitioner never raised the possibility of amending the information (cf. Fed. R. Crim. P. 7(e)) but only urged dismissal of the charge. What is more, petitioner could have raised his objection at any time prior to trial. The trial court could then have dismissed the information and the government could have filed an amended information or sought an indictment, as it ultimately did. This stands as an independent argument
(continued on next page)

the Double Jeopardy Clause prohibits retrials after some mid-trial, pre-verdict terminations of trials is to protect the defendant's "valued right" to proceed to verdict in the trial then underway, double jeopardy protection should not be afforded (absent prosecutorial or judicial overreaching) to defendants who do not assert their "valued right," but instead themselves request termination of the first trial. Cf. United States v. Gentile, 525 F.2d 252 (C.A. 2), certiorari denied, 425 U.S. 703; United States v. Sedgwick, 345 A. 2d 465 (D.C. Ct. App.), certiorari denied, May 4, 1976 (No. 75-5986).

The cases upon which petitioner relies do not support a contrary result. In Downum v. United States, 372 U.S. 734, the termination of the first trial operated as a "post jeopardy continuance to allow the prosecution to strengthen its case" (Illinois v. Somerville, supra, 410 U.S. at 469); such a factor was no more operative here than in Somerville. In Jorn, unlike the instant case, the trial court's action was an abuse of discretion, and the defendant not only had not requested termination of the trial but was afforded no opportunity to register any objection to the trial court's abrupt discharge of the jury (400 U.S. at 487). Finally, United States v. Jenkins, 420 U.S. 358, involved a determination in the defendant's favor on the merits, made by the factfinder at the conclusion of the trial; the ruling in the instant case was plainly not a determination on the merits; the judge did not act in his capacity as fact-finder in dismissing the information, and thus Jenkins does not aid petitioner.

2. We recognize that this case touches upon an area of double jeopardy jurisprudence -- the permissibility of government appeals and/or retrials following mid-trial

(continued from previous page)
why the Double Jeopardy Clause does not forbid the second trial. United States v. Kehoe, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909.

terminations by the judge as a result of some legal ruling -- that we believe is in great need of further examination by this Court. We have urged the Court to undertake this inquiry in New York v. Brown, petition for writ of certiorari pending, No. 76-358, and we continue to believe that certiorari should be granted in that case and the issue it presents should be resolved at the Court's earliest convenience. 5/

There is, however, some solid ground in this area that need not presently be repatrolled. A second trial is barred when the finder of fact has returned a verdict of acquittal, even though such verdict may be the product of legal error (United States v. Wilson, 420 U.S. 332, 344-351). On the other hand, the Double Jeopardy Clause does not bar a second trial when a defendant has moved for a mistrial (United States v. Dinitz, 424 U.S. 600), has had a conviction set aside on appeal or collateral attack (United States v. Tateo, 377 U.S. 463), or, as in this case and Somerville, when a defect in the institution of the proceedings, not going to the merits of a defendant's guilt or innocence, makes a termination of the proceedings manifestly necessary in the interests of public justice.

In sum, we submit that there is no realistic prospect that cases such as United States v. Martin Linen Supply Co., No. 76-120, certiorari granted November 1, 1976, or New York v. Brown, supra, should the Court agree to hear it, would lead to the overruling or material impairment of the holding of Somerville. If we are correct that Somerville controls this case, no useful purpose could be served by granting review

5/ Since the Court has not acted upon New York's petition, we surmise that it may be holding the case pending disposition of United States v. Martin Linen Supply Co., No. 76-120, certiorari granted November 1, 1976. Because Martin Linen does not involve a mid-trial termination, but rather one occurring at a time when the Double Jeopardy Clause would not have barred a retrial, we think it unlikely that the decision in Martin Linen will be of material assistance in resolving the important issues in Brown, and we continue to believe that the Court should hear Brown this Term.

in the instant case or by holding it to await the disposition of other cases now pending.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-5187

PHILLIP JEROME LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 539 F.2d 612 (App. p. 17). The United States District Court for the Northern District of Indiana did not issue an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1976 (App. p. 17). The petition for a writ of Certiorari was filed on August 9, 1976, and was granted on January 10, 1977. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Was the petitioner deprived of his right not to be put twice in jeopardy of life or limb, or deprived of his liberty without due process of law, if his motion for dismissal of the defective information, made at the pretrial stage, was taken under advisement and not decided by the trial court until all the evidence had been heard, the information was then dismissed just before a verdict was rendered, and a second complete trial was had, which resulted in conviction?

STATUTES INVOLVED

The portion of the United States Constitution involved is the Fifth Amendment, which reads in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . .

The statutes involved in the information filed against the defendant are Title 18, U.S.C. Section 13, and Section 10-3030 Burns Indiana Statutes (App. p. 5).

STATEMENT OF THE CASE

On February 6, 1974, petitioner Phillip Jerome Lee was charged in an information with violating Title 18, United States Code Sec. 13 and Section 10-3030 Burns Indiana Statutes. The information alleged a theft by petitioner of property belonging to Charles Bilskie, on land acquired for the use of the United States and under the exclusive jurisdiction thereof.

Petitioner waived his right to trial by jury. On July 16, 1974, prior to the commencement of the trial, petitioner moved to dismiss the information because it failed to allege that the offense was committed knowingly and with the intent to deprive the owner of the use and benefit of the property. Hon. Jesse Eschbach, in the District Court for the Northern District of Indiana, stated that he would not rule on the motion at that time and took it under advisement (1st Tr. Trans. pp. 3-5, App. pp. 7-9). The Court proceeded to hear the entire case. After both sides rested, and before any verdict was given, the District Court dismissed the information. The District Court stated that the defect in the information was obvious on its face: "No such allegation is contained, no matter how I stretch my imagination when I read the Information. There is nothing here that even smacks of an element of intent." (1st Tr. Trans. pp. 67-68, App. p. 13).

On September 25, 1974, a Grand Jury returned an indictment charging the petitioner with the same crime concerning the same event. This indictment was drawn so as to cure the defect in the information. On June 23, 1975, the petitioner was tried in a bench trial before Hon. Robert Grant, Judge Eschbach having disqualified himself. The petitioner was found guilty at

the second trial, and on August 9, 1975, petitioner was sentenced to be imprisoned for one to five years, and to be disenfranchised and rendered incapable of holding any office of trust or profit for a period of five years.

A direct appeal was taken to the United States Court of Appeals for the Seventh Circuit. In a decision rendered July 21, 1976, that Court affirmed. The opinion is found at 539 F.2d 612.

SUMMARY OF ARGUMENT

Prior to the commencement of petitioner's first trial, he objected to the sufficiency of the charging information. Instead of ruling on the motion or granting a continuance to research the law, the trial court took the motion under advisement and, in a bench trial, heard all the evidence. Before any verdict was given, the trial court granted petitioner's motion and dismissed the action. The Government indicted petitioner for the same crime, and a second trial was held, which resulted in conviction. That second trial was barred by the Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment.

ARGUMENT

I.

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL

A. Introduction

The Double Jeopardy Clause is an essential bulwark in the protection of individuals from prosecutorial or judicial abuse. It enunciates a "policy of avoiding multiple trials, [which] has been regarded as so important that exceptions to the principle have only been grudgingly allowed."[1]

Every case in this Court in which it was held that a defendant was not entitled to invoke the protection of the Double Jeopardy Clause falls into at least one of three categories: 1) The first trial was terminated at an early stage—"before the attachment of liability"; 2) The first trial was prosecuted up through a verdict of guilty against the defendant; or 3) The first trial was terminated by a mistrial required by "manifest necessity," such that the "ends of public justice" suggest that it would be unfair to have precluded the Government from proceeding with a second prosecution.[2]

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[1] *United States v. Wilson*, 420 U.S. 332, 343 (1975).

[2] This category is the most difficult to describe by a short-hand rule. "[V]irtually all of the cases turn on the particular facts and thus escape meaningful categorization . . ." *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

The case at bar falls into *none* of these categories. Therefore, the Double Jeopardy Clause should bar a second trial.

Without a doubt, "liability attached" at the first trial. Not only is the *Serfass* test,[3] of beginning to hear evidence, satisfied; here *all* the evidence was heard. Second, in contrast to cases in which a judgment was reversed on appeal, in this case the trial court declined to render a verdict; after the evidence was heard, the court agreed that the information charging defendant was plainly defective. Finally, there were numerous alternatives to proceeding in this highly prejudicial manner. There was no "manifest necessity" for having two trials.

Petitioner suggests that there are sound policy reasons why the Constitution requires the invocation of the Double Jeopardy Clause when none of the above three situations exists. The cases in this Court clearly support such a result.

B. There are Compelling Policy Reasons for Invoking the Protection of the Double Jeopardy Clause

Historically, the Double Jeopardy Clause was a mechanism for protecting individuals from excessive zeal on the part of the prosecutor. Trial by jury and an independent judiciary are some devices to protect the

[3] *Serfass v. United States*, 420 U.S. 377, 388 (1975). See text accompanying fn. 7, *infra*.

individual. But the Double Jeopardy Clause was directed at a particular evil. Absent it, a prosecutor might bring continued actions against an individual, for the same alleged crime, until some judge or jury were willing to acquiesce in a guilty verdict. Therefore, the double Jeopardy Clause, in its simplest form, is directed at preventing multiple prosecutions; it states that once an individual is tried, he may not be charged with, or tried for, the same offense.[4]

The Double Jeopardy Clause serves additional functions. It is clear that the very process of undergoing trial is a traumatic experience. It goes without saying that the pretrial and trial processes cause anxiety and embarrassment for the defendant, for he faces the very real risk that he will be deprived of his life or liberty. This emotional harm is compounded by the adverse publicity in the media, the embarrassment to him, his family and friends, financial expense, possible loss of job, and the social ostracism that result from the criminal process. Therefore, the Double Jeopardy Clause proclaims a policy that, absent compelling need, it is improper—in fact, unconstitutional—to subject an individual to these traumas more than once.[5]

[4] "[T]he underlying premise was generally that a defendant should not be twice tried or punished for the same offense." *United States v. Wilson*, 420 U.S. 332, 339 (1975).

[5] "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ." *Green v. United States*, 355 U.S. 184, 187 (1957).

Finally, the Double Jeopardy Clause furthers notions of procedural fairness. It contains a due process concept. Any trial attorney would have a greater chance of success if he or she could first have a dress rehearsal of the trial–complete with defendant, witnesses and judge–prior to the "trial that counted." Absent the Double Jeopardy Clause, the prosecution could learn if the defendant would take the stand in his own behalf, and if so, what he would testify to. The prosecution could learn the questions that the defendant would ask of the prosecution's witnesses on cross-examination. The prosecution could learn every detail of the defendant's alibi. The prosecution could learn which of its witnesses performed well under the stress of trial, and which witnesses might best not be used at the second, "real trial." Therefore, the Double Jeopardy Clause cuts off this option unless there is a "manifest necessity" for holding a second trial.[6]

C. The First Trial Clearly Went Beyond the Point at Which Jeopardy Attached, Since the Trial Court Heard all the Evidence

Crucial to the invocation of the Double Jeopardy Clause is a determination of when jeopardy "attaches."

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." . . . In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn. . . . In a non-jury trial, jeopardy attaches *when the court begins to hear evidence*.[7]

[6] *United States v. Perez*, 9 Wheat. 579 (1824).

In the case at bar, since the trial court not only *began to hear evidence*, but in fact *heard the entire case*, there can be no doubt that jeopardy attached.

The opinion of the court below suggests that, notwithstanding the fact that jeopardy "attached," there was in fact "no trial" because the information was defective. The theory would appear to be that since, as a matter of law, the defendant could not have been convicted under that information, the entire procedure was void *ab initio*, and the court at the second trial could act as if the first trial had never taken place.[8]

One hardly needs citations for the principle that people have been imprisoned notwithstanding the fact that the indictment or information charging them with a crime was defectively drawn.[9] The defect may not be recognized until the appellate process has run its course, often several years after the defendant is initially deprived of his liberty. In fact, the defect may not be recognized until years later, only upon collateral attack, or even not at all, since the defendant may already have

[7] *Serfass v. United States*, 420 U.S. 377, 388 (1975) (Emphasis added) (Citations omitted).

[8] This Court has firmly rejected such an argument if the defendant was acquitted, even when the indictment was so defective that it could not have supported a conviction. *United States v. Ball*, 163 U.S. 662 (1896).

[9] See *United States v. Ball*, 163 U.S. 662, 668 (1896): "Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits."

been released from incarceration. Thus, to suggest that petitioner could "never" have been deprived of his liberty on this information is either naive or disingenuous.

The opinion below overlooks two of the underlying policy reasons for having double jeopardy protection. First, even if, on appeal, it would turn out that any conviction would have to be reversed, and even if the defendant was not deprived of his liberty in the meantime, the petitioner did not know this while the first trial was taking place. Indeed, since the judge took the matter under advisement, the judge himself apparently was not sure about the state of the law. Thus, both before and during the entire first trial, the petitioner was in genuine fear that he would be deprived of his liberty. One purpose of the Double Jeopardy Clause is to prevent a person from having to undergo this same traumatic experience more than once from prosecutions arising out of the same incident.[10]

Second, another policy objective of the Double Jeopardy Clause is to prevent the prosecution from having a dress rehearsal of the actual trial. Even if it is true that the first proceeding could not, as a matter of law, have resulted in a valid conviction, the petitioner suffered the same disability; he had his trial strategy laid bare before the prosecution. Before the trial began, the petitioner objected that the information against him was defective, and that there was no proper basis for proceeding with the trial. By postponing a decision until after the trial was over but without pronouncing a verdict, the trial judge gave the prosecutor the opportunity to preview the evidence in the case, at no risk to

[10]*Green v. United States*, 355 U.S. 184 (1957).

the prosecutor that the petitioner would be acquitted, but at a very high cost to the defendant.[11]

What took place here was more than just pre-trial discovery of the defendant in a criminal case—a procedure, not so incidentally, which to the extent enjoyed in this case, is foreign to our system. It was a full scale dress rehearsal, with the petitioner having his life and liberty put in jeopardy and experiencing the trauma of being put to trial. It is such a procedure which the Double Jeopardy Clause of the Fifth Amendment proscribes.[12]

[11]The evidence at the two trials was so similar that the Assistant U.S. Attorney was able to use the transcript of the first trial as a script for questioning witnesses at the second trial.

"THE COURT: I imagine that if the information that is presented here—which I gather from the way the prosecutor followed the transcript was probably about the same as it was in the other trial—thus it came as no surprise to this defendant.

"By the way; is that true, Mr. Gray?

"MR. GRAY [Assistant U.S. Attorney]: I'm sorry, Your Honor. Were you discussing the transcripts from the first case?

"THE COURT: Yes. That is, did the evidence generally follow what was presented before?

"MR. GRAY: Yes."

(2nd Tr. Trans. p. 89, App. p. 15).

[12]Compare *Ashe v. Swenson*, 397 U.S. 436, 447 (1970): "In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated *the first trial as no more than a dry run for the second prosecution . . . But this is precisely what the constitutional guarantee forbids.*" (Emphasis added). Although petitioner does not suggest that here the prosecution intended to use the first trial as a dress rehearsal, the actual result was clearly the same.

D. Double Jeopardy Protection May Be Invoked When the First Trial Did Not Result In a Conviction and a Reversal Thereof

It is generally accepted that if the first trial results in a conviction, which is then set aside either by the trial judge or by an appellate court, the Double Jeopardy Clause does not preclude a retrial. This principle is reflected in a line of cases beginning at least as early as *United States v. Ball*, 163 U.S. 662 (1896) and reaffirmed as recently as *United States v. Wilson*, 420 U.S. 332 (1975).[13] The very reasons for permitting reprosecution even though the conviction is infected with error suggest why a second trial should *not* be permitted when there is *no* conviction in the first trial.

First, the Double Jeopardy Clause is said to protect the defendant's "valued right to have his trial completed by a particular tribunal."[14] Obviously, in the

[13]Other cases so holding include *United States v. Tateo*, 377 U.S. 463 (1964); *Forman v. United States*, 361 U.S. 416 (1960); *Bryan v. United States*, 338 U.S. 552 (1950); and *Stroud v. United States*, 251 U.S. 15 (1919).

On the other hand, it is clear that if the defendant is convicted of a lesser included offense but is acquitted of the more serious offense, he may not be retried for the latter offense even if the conviction is set aside on appeal. *Green v. United States*, 355 U.S. 184 (1957); *Benton v. Maryland*, 395 U.S. 784 (1969).

[14]*Wade v. Hunter*, 336 U.S. 684, 689 (1949), quoted in *United States v. Jorn*, 400 U.S. 470, 484 (1971).

It is interesting to note that "jeopardy" is derived from the Old French *jeu parti*, literally meaning "divided game." Merriam-Webster's Seventh New Collegiate Dictionary, p. 455. This carries the suggestion that in both the game and the trial, there must be a decision or verdict. Each participant is entitled to continue until he wins or loses. In court, as in sport, it is inappropriate for one side to stop when he thinks he may be behind, only to start again before a different referee.

case of a conviction, this right is preserved to the defendant, albeit unsuccessfully from his point of view. He was given the opportunity to be acquitted. However, in the case at bar, by terminating the trial after all the evidence was introduced, but before the verdict was announced, the petitioner was deprived of this valued right.

Second, this Court has held in *Green v. United States*, 355 U.S. 184, 189 (1957) that the defendant's taking an appeal after a conviction operates as a waiver of the Double Jeopardy Clause, since he is interested in having the first verdict set aside. However, in the case at bar, since there was no verdict from which to appeal, there is no implied waiver. Therefore, the petitioner is entitled to insist upon the protection afforded him by the Fifth Amendment.[15]

[15]Reliance on this "waiver" theory has recently been questioned.

> This exception to the "one trial" rule has been explained on the conclusory theories that the defendant waives his double jeopardy claim by appealing his conviction, or that the jeopardy continues until he is acquitted or his conviction becomes final, see *Green v. United States*, 355 U.S. 184, 189 (1957). As Mr. Justice Harlan noted in *United States v. Tateo*, 377 U.S. 463, 465-466 (1964), however, the practical justification for the exception is simply that it is fairer to both the defendant and the Government. *United States v. Wilson*, 420 U.S. 332, 343-44, n. 11 (1975).

This "fairness" concept—which is similar to the *Perez* standard of "manifest necessity" and the "ends of public justice"—will be discussed in the next section of this brief. See text with fn. 18, *infra*.

In its opinion, the Seventh Circuit analogized the case at bar to *Ball*. The court stated that "[h]ad Lee's motion to dismiss been denied and had he been found guilty, his appeal would likely have resulted in a reversal and a remand for retrial. Under *United States v. Ball, supra*, a new trial would not constitute double jeopardy."[16] The analogy the court draws has surface plausibility. But the fact remains that petitioner was *not* convicted, and no amount of analogizing can add this element. Therefore, if the Double Jeopardy Clause is held not to protect petitioner, it must be because of some "manifest necessity" respecting the dismissal of the case immediately prior to the time for the verdict—a question to which we now turn.

E. A Second Trial is Not Allowed, Since the Timing of the Dismissal Was Not Dictated By "Manifest Necessity" Or the "Ends of Public Justice"

The most elusive category of cases—in which this Court has allowed a second trial after the first trial was terminated by a dismissal or mistrial—is

> premised on the "public justice" policy enunciated in *United States v. Perez* [9 Wheat. 579 (1824)]. . . . A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.[17]

[16]539 F.2d at 614 (App. p. 20).

[17]*Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

This is a refinement of the *Perez* standard, which held that "the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[18] But this Court has also made clear that this right to conduct a second trial is a very limited one.[19]

This Court has observed that the cases permitting or prohibiting a retrial subsequent to the termination of the first trial "escape meaningful categorization."[20] However, an examination of the "particular facts"[21] of those cases may prove helpful. Let us first examine some cases in which a second trial was permitted.

In the most recent decision—*United States v. Dinitz*, 424 U.S. 600 (1976)—a retrial subsequent to the mistrial was approved because of the refusal of the defendant to proceed with the trial with his alternate attorney following contemptuous behavior on the part of his principal attorney. In *Gori v. United States*, 367 U.S. 364 (1961), the mistrial was ordered to protect the defendant when the trial court feared that the prosecutor's line of inquiry would improperly inform the jury of prior crimes committed by the defendant.

[18]9 Wheat. at 580.

[19]"The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed." *United States v. Wilson*, 420 U.S. 332, 343 (1975).

[20]*Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

[21]*Id.*

In *Lovato v. New Mexico*, 242 U.S. 199 (1916), the trial court dismissed the already impanelled jury because the defendant's demurrer to the indictment was technically insufficient. In *Keerl v. Montana*, 213 U.S. 135 (1909), the Court followed an established line of cases[22] allowing retrial if the mistrial was the result of the inability of the jury to agree on a verdict.

Finally, *Illinois v. Somerville*, 410 U.S. 458 (1973), is instructive because its facts appear, on the surface, to be quite similar to the facts in the case at bar, and therefore it was the principal decision relied on by the Seventh Circuit in affirming petitioner's conviction. The defendant in *Somerville* had been indicted by an Illinois grand jury for the crime of theft; however, the indictment failed to allege that the defendant intended permanently to deprive the owner of his property. As a matter of state law, such an indictment was fatally defective, and this fault could be raised on appeal or even by collateral attack. Therefore, after a jury had been impanelled, the trial court declared a mistrial. Even though the case had reached the stage at which jeopardy had attached, this Court held that the Double Jeopardy Clause did not preclude a second trial, in view of the "manifest necessity" doctrine enunciated in *Perez*.

There are critical differences between *Somerville* and the case at bar. In *Somerville*, no evidence was introduced before the mistrial was declared. Here, the *entire case* was tried before the judge dismissed the action. In *Somerville*, the dismissal was ordered immediately after the court's attention was called to the

[22] *Moss v. Glenn*, 189 U.S. 506 (1903); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Perez*, 9 Wheat. 579 (1824).

defect. Here, the case proceeded, while the trial court took the petitioner's motion under advisement.[23] In *Somerville*, it was the declaration of the mistrial that was objected to by the defendant, while here, the petitioner objected to proceeding with the trial.

The Court's decisions refusing to permit a second trial after the dismissal or the declaration of a mistrial also reflect the basic policies of the Double Jeopardy Clause. In *Downum v. United States*, 372 U.S. 734 (1963), after a jury was impanelled (and therefore after jeopardy had attached), the prosecution discovered that a key witness for two of the six counts was absent. Although the defendant expressed a desire to proceed immediately on the other four counts, the judge dismissed the jury. A new jury was impanelled two days later. This Court held that the delay operated as a continuance solely for the benefit of the prosecution and held the second trial barred.[24] In *United States v. Jorn*, 400 U.S. 470 (1971), the jury was dismissed and a mistrial ordered because the trial judge felt that the prosecution witnesses had not been adequately advised of their rights against self-incrimination. This Court barred the second trial because this procedure deprived

[23] As suggested elsewhere, see text with fns. 14 and 27, in the case at bar, since testimony was taken, the petitioner was entitled to proceed up through a verdict, on which he might have been acquitted.

[24] In *Downum*, the trial court's ruling interfered with the defendant's choice—to proceed with the trial. In the case at bar, the trial court's denial of petitioner's objection to the information also interfered with his choice—in this case, *not* to proceed with the trial. The effect of both rulings is an interference with constitutionally protected rights.

the defendant of the right to proceed before a tribunal that might have been favorable to him.

A recent decision invoking the protection of the Double Jeopardy Clause is *United States v. Jenkins*, 420 U.S. 358 (1975). Following a bench trial, the trial court *dismissed* the indictment and discharged the defendant.[25] This Court held that an appeal by the Government was foreclosed[26] because it was unclear whether the adjudication was on the factual merits or the result of the district court's view of the prevailing legal standard. "The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's [defendant's] favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause."[27] 420 U.S. at 370.

[25]In *Jenkins*, this Court emphasized that there is an important distinction between an action terminated by mistrial and one terminated by dismissal: "[W]e think it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." 420 U.S. at 365, n. 7. It bears emphasis that the case at bar was *dismissed*, and *not* terminated by mistrial: . . . "I must *dismiss* this case because the Information was improperly drawn. . . . I have to *dismiss*." (1st Tr. Trans. p. 67, App. p. 13) (Emphasis added).

[26]The standard under the statute giving the Government the right to appeal—Title 18, U.S.C. Sec. 3731—is the same as that of the Double Jeopardy Clause. See, e.g., *United States v. Jenkins*, 420 U.S. 358, 364, 366.

[27]It is true that the district court judge stated that he believed that the petitioner's guilt had been proven beyond a reasonable doubt. But, since this statement was immediately followed by the dismissal of the action, this "verdict" can be viewed as completely gratuitous. It is arguable that the trial judge might have reflected considerably longer before pronouncing a verdict, and that the verdict might have been different, had the judge known that the petitioner would have been imprisoned instead of discharged.

This Court has pointed to various factors to determine whether the dismissal or declaration of a mistrial precludes a second trial. One factor is whether the mistrial comes at the defendant's request.[28] In the case at bar, the motivating force is difficult to pinpoint. It is true that it was the petitioner who, prior to the trial, called the court's attention to the defective information and moved to have the action dismissed immediately. On the other hand, the underlying defect was entirely the result of the Government's oversight,[29] and the timing of the dismissal was solely the result of the trial court's earlier inaction.

Even if the dismissal is deemed to be at the petitioner's election, there are other factors to consider. One method of determining the "manifest necessity" of the trial judge's declaration of a mistrial at a particular stage is suggested by Mr. Justice Marshall's dissenting opinion in *Somerville*—consider the alternatives available to the trial judge.[30] In *Somerville*, this Court held that

[28]"The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause." *United States v. Dinitz*, 424 U.S. 600, 608 (1976).

In *United States v. Jorn*, 400 U.S. 470 (1971), the Court held that a retrial was precluded even though the declaration of the mistrial was not requested by the defendant; the trial court ordered it *sua sponte*. The foreclosure of a second trial is therefore even more appropriate here, where the petitioner's motion called the trial court's attention to the defect and the court nonetheless proceeded with the trial.

[29]See fn. 33, *infra*.

[30]"The first element to be considered is the necessity for declaring a mistrial. That I take to mean consideration of the alternatives available to the judge confronted with a situation in the midst of trial that seems to require correction." 410 U.S. at 478.

(continued)

it would be wasteful if public policy were to require that the first trial continue with full knowledge that it was a charade, that the conviction—if it were obtained—would have to be reversed on appeal, and that a second trial would have to be held.[31] In that case, the option of a continuance was not available; it would have been highly impractical for the trial judge to keep together the jury, which had already been impanelled, while the prosecution went before the grand jury to obtain a new indictment.

In the case at bar, however, such practical problems were not present. The trial judge did not rule on defendant's motion before the trial started because, he claimed, it was only presented on the morning of trial

(footnote continued from preceding page)

Since *Somerville*, a majority of this Court has also adopted as a standard for evaluating the propriety of a mistrial the question of whether the trial court properly weighed the alternatives available to him. In *United States v. Dinitz*, 424 U.S. 600, 604 (1976), the trial court offered the defendant three alternative courses; one such course, the declaration of an immediate mistrial, was the option chosen by the defendant. The Court emphasized that the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." 424 U.S. at 609. By taking petitioner's motion under advisement, rather than ruling on it immediately or granting a continuance, the District Court here deprived the petitioner of that control.

[31]The Court's opinion states: "If a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned." 410 U.S. at 469. In the case at bar, the trial judge did the exact opposite. He wasted the time, money and energy of both sides by continuing the obviously fruitless trial.

and he would have to do some research.[32] Therefore, the judge allowed the trial to proceed, and then, once the trial was over, without any further argument by counsel, he dismissed the action.

It is difficult to understand why the trial judge found it necessary to take the petitioner's motion under advisement. When the testimony had concluded, the trial judge thought it perfectly clear that the information was defective.[33] If it was so obvious at 11:30 a.m., it is impossible to say that the alternative that the judge chose at 9:45 a.m.—of taking the motion under advisement and hearing the entire case—was the only sound alternative available to him.

Since the action was being tried without a jury, there was no reason whatsoever why the trial court could not instead have ordered a continuance, *prior* to starting the

[32]"It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them" (1st Tr. Tran. p. 3. See App. p. 8).

[33]"I must dismiss this case because the Information was improperly drawn. Whoever drew it up didn't even look at the Indiana statute. . . .

"*The briefest examination of the statute* establishes that knowingly is an [element of the] offense. . . . No such allegation is contained, no matter how I stretch my imagination when I read the Information. . . .

"Mr. Gray [the Assistant U.S. Attorney], I am not condemning you, I don't know who drafted it, but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course. You may carry that complete message back to your department." (1st Tr. Trans. pp. 67-68, App. p. 13-14) (Emphasis added).

trial, to do that research.[34] Once that research disclosed that the information was defective, the prosecution would then have had the opportunity to redraft it. Here, there simply was no "manifest necessity" for proceeding in a fashion that was calculated seriously to interfere with the petitioner's constitutional rights.[35]

The "manifest necessity" doctrine means more than that a trial court may terminate a proceeding infected with error. The implication of *Somerville* is that in certain cases the trial court may have a *duty* to declare a mistrial at a particular stage. Failure to dismiss the case at that time–when "manifest necessity" would so require–will mean that a later dismissal will preclude a retrial.[36]

[34]In view of the failure of the trial court to order a continuance *sua sponte*, it would have been appropriate for the prosecution to request the continuance, rather than sit back passively while the petitioner unsuccessfully asserted his rights. The U.S. Attorney may not have been personally responsible for drafting the defective information (see fn. 33). However, once the defendant called attention to the obvious defect, the U.S. Attorney was grossly negligent in not noting the defect and either moving for a continuance or joining in defendant's motion for an immediate dismissal. Such a course–which places only a small burden on the prosecution–would have prevented the constitutionally defective procedure eventually followed.

[35]Petitioner concedes that a very different case would be presented if a defendant had moved to dismiss the information only during or after the trial, and the motion were immediately granted. Such a defendant would be said to have waived the prejudicial effect of the introduction of any evidence up to that point by the untimeliness of the motion. However, the petitioner challenged the information at an early stage; it was prejudicial error for the trial court not to rule on the motion immediately, or at least grant a continuance to research the law.

[36]It is hard to say that once the testimony is concluded, "the declaration of a mistrial [and, a fortiori, a dismissal–see fn. 25, *supra*] was dictated by 'manifest necessity' or the 'ends of public justice.' " *Illinois v. Somerville*, *supra* at 463.

The Court below made much of the fact that the petitioner did not insist upon not proceeding with the first trial.[37] In fact, the defendant objected to the sufficiency of the information minutes before the court began to hear the evidence, and the court obviously had refused to rule upon the motion at that time. It would be elevating form over substance to require the defendant adamantly to insist that the trial be delayed until the judge ruled on the motion–in the face of the court's clear ruling–before the defendant would be entitled to rely on an essential constitutional right. Especially in a bench trial, counsel should not be required to press an objection and thereby risk provoking the ire of the trial judge.

In addition to the protection he is afforded by the appointment of counsel, the court and the prosecution also have a duty to protect the rights of defendants.[38] The court should, on its own initiative, have ordered a brief continuance so that it could research the law.

There is a third consideration determinative of the right to conduct a second trial subsequent to a dismissal or mistrial–whether the action was dismissed immediately upon the recognition of the facts necessitating

[37]"Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial." 539 F.2d at 614 (App. p. 20).

[38]"[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest 'that justice be done.' " *United States v. Agurs*, ____ U.S. ____, 96 S. Ct. 2392, 2401 (1976).

"The duty of the prosecutor is to seek justice, not merely to convict." Sec. 1.1(c), Standards Relating to the Prosecution Function, American Bar Association Project on Standards for Criminal Justice.

that mistrial, or whether the trial continued nonetheless:

> But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, *he may have little interest in completing the trial* and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause–the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions. . . . In the event of severely prejudicial error *a defendant might well consider an immediate new trial a preferable alternative* to the prospect of a probable conviction followed by an appeal, a reversal of the conviction, and a later retrial.[39]

In such cases as *Somerville* and *Gori*, the mistrial was ordered as soon as the defect was pointed out or became apparent to the trial court. Here, however, instead of granting him the immediate termination that he had requested, the court proceeded with the case, heard all the evidence, and only then dismissed the action. It is improper to make a defendant sit through a trial, over his objections to a defective information, knowing that he will have to do it all over again.[40] As

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[39]*United States v. Dinitz*, 424 U.S. 600, 608, 610 (1976) (Emphasis added).

[40]Of course, if he is unaware of the defect, then he is put in fear twice–something the Double Jeopardy Clause also proscribes.

this Court stated in *Dinitz*, such a procedure is inconsistent with the protection the Double Jeopardy Clause affords a defendant.

II.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL

The Due Process Clause of the Fifth Amendment requires that the United States adhere to certain procedural standards before depriving a person of life, liberty or property. The general limits of this requirement have been defined many times by this Court. One often-quoted statement is that

> [r]egard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain *whether they offend those canons of decency and fairness* which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." *Rochin v. California*, 342 U.S. 165, 169 (1952) (Emphasis added).

That the content of the Double Jeopardy Clause may be different from that of the Due Process Clause is clear. The extent of that difference is not nearly so clear.

Prior to 1969, this Court had held that the Double Jeopardy Clause did not apply to the states through the Due Process Clause of the Fourteenth Amendment

under the "incorporation principle."[41] Thus, in *Brock v. North Carolina*, 344 U.S. 424 (1953), the question of whether a state could retry a defendant whose trial was terminated by mistrial was limited to the protection afforded by the Fourteenth Amendment. In approving the second trial, this Court stated:

> Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. 344 U.S. at 427-28.

An indication of a situation in which the second trial would be barred by the Due Process Clause is found in Mr. Justice Frankfurter's concurring opinion in *Brock*:

> A State falls short of its obligation when it . . . prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time. 344 U.S. at 429.

In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court overruled *Palko* and held that the Due Process Clause of the Fourteenth Amendment incorporated the Double Jeopardy Clause, and that the latter Clause applied to the states as well as to the federal government. This decision would suggest that in the area of repetitive trials, the limits of these two protections are congruent. However, in a decision announced on the

[41] *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

same day as *Benton*, this Court considered a defendant's challenge to a longer sentence imposed on him after a second trial, than had been given him after his successfully-appealed first trial. *North Carolina v. Pearce*, 395 U.S. 711 (1969) held that this practice was not defective under the Double Jeopardy Clause (although that now applied to the states under the Fourteenth Amendment), but that it might nonetheless be inconsistent with the Due Process Clause. This Court remanded the decision, requiring that the second trial court at least articulate reasonable grounds for the longer sentence. Thus, it is suggested that, where fairness to the defendant is implicated by repetitive trials, the limits of the Due Process Clause are somewhat broader than those of the Double Jeopardy Clause.

The errors in the first trial discussed in the first portion of this brief—the gross defect in the information; the trial court's inability to recognize this defect when the petitioner's motion first brought it to his attention; the trial court's failure to order a continuance to research the sufficiency of the information; the prosecutor's failure to take any action when the petitioner moved to dismiss the information;[42] the admission of all the evidence at the first trial, and then the dismissal of the action without any verdict—are sufficiently egregious that the allowance of a second trial against petitioner does indeed "offend . . . canons of decency and fairness," and so violated petitioner's rights under the Due Process Clause.

[42] Compare *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

CONCLUSION

Petitioner was put in jeopardy of life or limb when he was tried pursuant to the defective information. The dismissal of the action by the trial judge, after all the evidence had been introduced but without entry of judgment, terminated this action. The Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment bar petitioner's retrial. The judgment of the court below should be reversed and all charges against the petitioner arising from this action should be dismissed.

Respectfully submitted,

/s/Conrad Kellenberg
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Supreme Court, U. S.
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No. 76-5187

In the Supreme Court of the United States

OCTOBER TERM, 1976

PHILLIP JEROME LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 17–20) is reported at 539 F.2d 612.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1976. The petition for a writ of certiorari was filed on August 9, 1976, and was granted on January 10, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may be retried after the court, at the defendant's request, dismissed the information during trial on the ground that it was defective on its face.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

STATEMENT

In an information filed on February 6, 1974, petitioner was charged with theft, in violation of the Assimilative Crimes Act (18 U.S.C. 13) and an Indiana state statute (A. 4). On May 24, 1974, the district court appointed Donald Swanson as petitioner's counsel and set July 16, 1974 (approximately two months later) as the trial date (A. 2).[1] Petitioner waived his right to be tried by a jury (A. 3), and a bench trial commenced as previously scheduled (A. 7).

The prosecutor made his opening remarks outlining the government's evidence (A. 7), and the district judge then invited defense counsel to make an opening statement. Mr. Swanson orally moved to dismiss the information on the ground that it failed to allege that petitioner committed the theft knowingly and intending permanently to deprive the victim of his property (A. 8–9). The district court remarked that counsel could have made this motion before the trial commenced, stating (A. 8):

> Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them. So I will hear you, but you have that problem.

[1] Swanson replaced another attorney, who was permitted to withdraw (A. 2).

The court observed that because it had "no opportunity to study this at all" it would deny the motion "at this time, but at my first opportunity I will check [the state case cited in support of the motion] and give [it such] consideration as appears to be warranted" (A. 9).

The court asked defense counsel whether he had "anything further by way of opening statement" (A. 9). Mr. Swanson made a brief opening statement. He did not object to proceeding with the trial (*ibid.*).

The prosecution then presented its case. Petitioner stipulated that the theft occurred, if at all, in the United States Post Office in Fort Wayne, Indiana, which was under the exclusive jurisdiction of the federal government (A. 10). The prosecution presented the testimony of two witnesses: Vance Travis, a security guard at the Post Office, and Charles Bilskie, the victim of the crime. Their testimony (Tr. 17–62) showed that Bilskie, who was 63 years old and blind, operated a news stand and candy concession in the Post Office lobby. On December 21, 1973, after Bilskie had placed his two wallets on a counter behind his stand, Travis saw petitioner go behind the counter and take the wallets. Travis shouted at petitioner, who tried to escape but was apprehended.

After a short recess petitioner moved for a judgment of acquittal, arguing that the prosecution had failed to prove criminal intent or that petitioner had possession of the wallets (A. 11–12). The court denied this motion on the understanding that its decision did not apply to petitioner's earlier motion concerning the adequacy of the charge, upon which the court had reserved decision (*ibid.*).

Petitioner rested without presenting any evidence (A. 13). The court then returned to the defense motions. As to the sufficiency of the evidence, the court told Mr. Swanson (*ibid.*): "Your motion addressed to the Government's proof borders on being frivolous. Your client has been proven beyond any reasonable doubt in the world, there is no question about his guilt; none whatsoever."

The court did not, however, render a formal verdict of guilty. It instead took up the motion to dismiss the information for failure to state all of the elements of the offense. The court granted this motion, holding that the information was improperly drawn because it did not charge that petitioner took the wallets knowingly and with the intent permanently to deprive the owner of his property (A. 13–14).

On September 25, 1974, petitioner was indicted for the theft of the wallets. The indictment alleged that petitioner committed the theft knowingly, with the intent to deprive Bilskie of his property. At a bench trial on June 23, 1975, the prosecution introduced the same evidence that had been produced in the first

trial. The defense again presented no evidence. The court rendered a verdict of guilty (Tr. 89–90).

The court of appeals rejected petitioner's argument that the second trial was barred by the Double Jeopardy Clause (A. 17–20). After concluding that the Clause should not be applied in a mechanical fashion (A. 19), the court went on (A. 20):

> In the case at bar, the motion of dismissal was made by the defendant on the day of trial. The dismissal was granted after the evidence was heard, but before any finding was made of guilt or innocence. It was not based on evidence adduced at trial, but rather on the failure of the information to state an essential element of the offense—in short, because of a jurisdictional defect. Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial. Under these circumstances, we conclude that the double jeopardy clause did not bar his retrial.

SUMMARY OF ARGUMENT

1. The Double Jeopardy Clause does not require society to marshal its resources to guarantee every defendant a single error-free proceeding, on pain of inability, when error arises, to complete the prosecution of those accused of crime. It is settled, for instance, that when an accused has had an opportunity to receive a verdict, has been convicted, and the conviction has been reversed on appeal because of error in the indictment, a second trial does not violate the

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Double Jeopardy Clause. Also, when during the course of a trial an accused willingly surrenders his right to receive the verdict of the factfinder by asking for a mistrial, this election removes any barrier to a second trial. And even when an ongoing trial is terminated over the defendant's objection, a new trial still may be held if there was manifest necessity to override the defendant's preference for the first tribunal. Each of these strands of double jeopardy law supports the propriety of petitioner's second trial.

The only factor that differentiates cases in which a conviction is reversed on appeal (and in which a second trial is indisputably allowed by double jeopardy principles) from cases in which an ongoing trial is aborted is that a mid-trial termination may deprive the defendant of his valued right to receive the verdict of the factfinder then sitting. All of the other considerations—the continuing state of anxiety, the expense of a second trial, and so on—are the same whether the second trial follows a reversal on appeal or a mid-trial termination. It follows logically that the rules governing retrial after a mid-trial termination should not differ from those allowing retrial after reversal of a conviction, except to the extent necessary to vindicate this single additional interest of protecting the defendant's right to receive a verdict at the first trial.

But when the defendant seeks the pre-verdict termination of his trial, the granting of his request does not "deprive" him of the right to receive the factfinder's verdict; to the contrary, the mid-trial termination gives to the accused an outcome he apparently values more highly than receiving the factfinder's verdict. After all, a defendant who desires to receive the factfinder's verdict could do so by submitting his case to the factfinder and preserving his legal issues for a ruling after trial.[2] Accordingly, logic and policy dictate that a request by the accused to terminate an ongoing trial should ordinarily remove any double jeopardy bar to a second prosecution. *United States* v. *Dinitz*, 424 U.S. 600.

It would be strange if the only way for a trial judge to safeguard the public's interest in fair trials designed to end in just judgments were to deny seemingly meritorious requests to terminate ongoing trials. Yet if the district court (erroneously) had denied petitioner's motion to dismiss the information, the trial would have gone to verdict, the conviction would have been set aside (either by the district court or on appeal), and a second trial could have been held free of any serious contention that the Double Jeopardy Clause had been violated. Why should petitioner acquire immunity from prosecution because the district court, following a procedure that was agreeable to petitioner, correctly granted his motion, thereby sparing him the trauma of a pronouncement of guilt and

[2] In the present case, for instance, petitioner could have asked that a verdict be returned and then moved for an arrest of judgment pursuant to Fed. R. Crim. P. 34. Such a procedure would have protected fully his right not to be convicted upon a defective information.

the expense and delay that might have been necessary to have that verdict set aside?

2. Although petitioner agrees with much of this analysis (Br. 22 n. 35), he argues that this case should be assessed by different standards because the termination of the trial did not occur until after all the evidence was taken. But any hardship petitioner may have experienced during the taking of evidence in the first trial was caused, in substantial measure, by his counsel's delay in making the motion to dismiss the information. Despite the fact that counsel had almost two months in which to prepare and file written motions before trial, counsel's first objection to the sufficiency of the information came in an oral motion made after trial had commenced and the prosecutor had made his opening statement. Although this mid-trial motion was made before the technical "attachment" of jeopardy, it came too late to allow either the judge or the prosecutor any opportunity to research before trial the state cases upon which petitioner relied.

The district court therefore acted reasonably in proceeding with the trial until a convenient recess provided time to inquire further. If petitioner were dissatisfied with the court's decision to begin taking evidence before ruling on the motion to dismiss, he could have objected or asked for a continuance. He did neither, and his failure to do so must be taken as an acquiescence in the hearing of evidence, at least until the first regular recess during the trial. Similarly, when the judge was ready to rule on the motion

to dismiss, petitioner did not ask that the ruling be reserved until after verdict (doubtless because the judge had prefaced his ruling by stating (A. 13) that petitioner was guilty "beyond any reasonable doubt in the world"). Under the circumstances, any hardship caused by the decision to hear evidence must be "subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689.

ARGUMENT

PETITIONER'S SECOND TRIAL DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

A. INTRODUCTION

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717. Petitioner's first trial was aborted, at his request, before a verdict of guilt or innocence was rendered by the factfinder. This case therefore does not present any question concerning a second prosecution after a conviction or an acquittal by the factfinder.[3] It does, however, pre-

[3] Other cases now before the Court present questions concerning the holding of second trials following a conviction for a closely related offense (*Jeffers* v. *United States,* No. 75–1805, argued March 21, 1977) and following a legally erroneous "acquittal" by the judge after the jury was unable to reach a verdict (*United States* v. *Martin Linen Supply Co.,* No. 76–120, argued

sent the question whether petitioner's second trial for the same crime was proper.

The prohibition against multiple trials for the same offense is based upon the special interests protected by the Clause.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States,* 355 U.S. 184, 187–188, quoted in *Serfass* v. *United States,* 420 U.S. 377, 387–388. See also *Breed* v. *Jones,* 421 U.S. 519; *United States* v. *Jorn,* 400 U.S. 470, 479 (plurality opinion).

Because of the special rules of finality created by the Clause, the prosecution may not retry a defendant who has been acquitted, on the facts, by the finder of facts, whether or not the instructions or legal principles underlying the acquittal were erroneous.[4]

February 23, 1977). We have furnished to counsel for petitioner copies of our briefs in *Jeffers* and *Martin Linen.*

[4] A second trial also is barred when the prosecution, seeing that things are going badly, seeks "another, more favorable opportunity to convict the accused" (*Gori* v. *United States,* 367 U.S. 364, 369) or, more generally, when the government seeks to "do better a second time" with a more favorably disposed factfinder (*Brock* v. *North Carolina,* 344 U.S. 424, 429 (Frankfurter, J., concurring)).

United States v. *Wilson,* 420 U.S. 332, 347–348; *United States* v. *Jenkins,* 420 U.S. 358 (decision on the general issue of guilt or innocence by judge acting as factfinder in bench trial); *Fong Foo* v. *United States,* 369 U.S. 141 (court instructed the jury to return a verdict of not guilty in the middle of the prosecution's case, and the jury did so); *Kepner* v. *United States,* 195 U.S. 100. But only a "verdict of acquittal at the hands of the jury [or judge in a bench trial]" (*Forman* v. *United States,* 361 U.S. 416, 426) is an *absolute* bar to a second trial. In any other event, whether a second trial may be held depends upon a careful balancing of the defendant's interest in avoiding repetitious trials against the public's interest in "fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689.

With the exception of the principle that a verdict of acquittal by the factfinder is a complete bar to reprosecution, the Court has eschewed the application of any "mechanical formula" or "rigid rules." *Illinois* v. *Somerville,* 410 U.S. 458, 462–463, 467. A rule that a second trial for the same offense invariably violates the Double Jeopardy Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Wade* v. *Hunter, supra,* 336 U.S. at 688–689. As Mr. Justice Harlan

explained in *United States* v. *Jorn, supra,* 400 U.S. at 483–484, "it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. * * * The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."

The most important value that may be disserved by a mid-trial termination is the right of the accused "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* 400 U.S. at 486. When an accused has had an opportunity to receive that verdict and has been convicted, a second trial does not violate the Double Jeopardy Clause even though a legal error may have prevented the factfinder from acquitting. See *Forman* v. *United States, supra; United States* v. *Ball,* 163 U.S. 662; *United States* v. *Tateo,* 377 U.S. 463. This principle has been carried so far as to permit a second trial even though the evidence at the first trial was insufficient to allow the jury to convict. *Forman* v. *United*

States, supra, 361 U.S. at 424–425; *Bryan* v. *United States,* 338 U.S. 552, 559–560.[5]

Moreover, when during the course of a trial an accused willingly surrenders his right to receive the verdict of the factfinder, this choice removes any barrier to a second trial, unless the election was forced by judicial or prosecutorial overreaching. *United States* v. *Dinitz,* 424 U.S. 600. Finally, even if an ongoing trial is terminated over the defendant's objection, thereby depriving him of his "valued right" to receive the factfinder's verdict (*Wade* v. *Hunter, supra,* 336 U.S. at 689), a new trial still may be held if there was manifest necessity to override the defendant's preference for the first tribunal. *United States* v. *Perez,* 9 Wheat. 579; *Illinois* v. *Somerville, supra.*

Each of these strands of double jeopardy law supports the propriety of petitioner's second trial. Petitioner was convicted by the factfinder at the first trial in all but matters of form; the district judge stated that petitioner was guilty "beyond any reasonable doubt in the world" (A. 13). Petitioner willingly surrendered his right to receive a more formal verdict

[5] Compare *United States* v. *Howard,* 432 F. 2d 1188 (C.A. 9), and *Greene* v. *Massey,* 546 F. 2d 51 (C.A. 5), which discuss and apply this rule, with *United States* v. *Wiley,* 517 F.2d 1212 (C.A.D.C.), which holds, in the exercise of the powers conferred on appellate courts by 28 U.S.C. 2106, that after a conviction is reversed because the evidence is insufficient a second trial should not be held unless the insufficiency is attributable to causes beyond the control of the prosecution.

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from the factfinder in his first trial. If the trial had gone to verdict, it would have been necessaary to set that verdict aside, and a second trial could have been held. We discuss these considerations below in greater detail.

B. PETITIONER'S MOTION TO DISMISS THE INFORMATION REMOVED ANY BAR TO A SECOND TRIAL

1. In the absence of judicial or prosecutorial overreaching, a motion for a mistrial removes any double jeopardy objection to a second trial

"[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *United States* v. *Jorn, supra,* 400 U.S. at 485. This principle follows from the rule that, if the trial had gone to completion and a conviction had been reversed on appeal, a second trial could have been held. There is no point in requiring a defendant to endure the remainder of a trial that already (in his opinion) is so infected with error that a reversal and a second trial are bound to follow. Yet, unless a second trial were permitted after a mid-trial termination at the request of the accused, district courts would tend "to reject the most meritorious mistrial motion in the absence of manifest necessity and to require, instead, that the trial proceed to its conclusion despite a legitimate claim of seriously prejudicial error." *United States* v *Dinitz, supra,* 424 U.S. at 610; footnote omitted.

The "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error." *Id.* at 609 (footnote omitted). If the defendant, for reasons he deems sufficient, asks to terminate the proceedings without receiving the verdict of the factfinder, the Double Jeopardy Clause does not prohibit a second trial.[6]

Petitioner surrendered his valued right to receive the verdict of the factfinder. After the trial had begun and the prosecutor had made his opening statement, petitioner's counsel made an oral motion to dismiss the information; when the trial judge rebuked counsel for making the motion so belatedly, counsel did not ask for a continuance to allow the judge to do legal

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[6] We use "factfinder" throughout this brief to refer to the jury in a jury trial and to the judge in a bench trial. The double jeopardy considerations are similar, since "the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials" (*United States* v. *Jenkins, supra,* 420 U.S. at 365). The only difference is that the judge in a bench trial resolves questions of both law and fact, whereas in a jury trial only the jury may resolve factual disputes. *Singer* v. *United States,* 380 U.S. 24. Because issues of fact resolved in favor of an accused may not be reexamined in a second trial (*Ashe* v. *Swenson,* 397 U.S. 436), it sometimes may be necessary in bench trial cases to determine whether the judge has acted in his capacity as factfinder or only in his capacity as the resolver of legal disputes. There is no need to make that inquiry here, however, because it is clear that the judge in petitioner's first trial did not purport to resolve any disputed factual issues in petitioner's favor, and the second trial did not call into question any disputed issues that previously had been resolved against the prosecution.

research before beginning to hear evidence; when the trial judge announced later during the trial that he was ready to rule on the motion to dismiss the indictment, counsel did not ask the judge to defer ruling until after a verdict had been rendered.[7] Petitioner's counsel showed not the slightest interest in receiving the verdict of the factfinder—which was understandable in light of the trial judge's emphatic and unequivocal statement that petitioner was guilty "beyond any reasonable doubt in the world" (A. 13). Petitioner was not deprived at the first trial of his interest in receiving a verdict or of any other interest protected by the Double Jeopardy Clause.[8]

[7] Unless, as in *United States* v. *Jorn*, *supra*, the trial court's action is so precipitate that it is impossible to protest, the defendant's failure to object to a termination of his trial should be treated as consent. *United States* v. *Goldstein*, 479 F. 2d 1061, 1066–1068 (C.A. 2); *Roberts* v. *United States*, 477 F. 2d 544, 545–546 (C.A. 8); *United States* v. *Pappas*, 445 F. 2d 1194, 1199–1200 (C.A. 3); *Scott* v. *United States*, 202 F. 2d 354, 355–356 (C.A.D.C.), certiorari denied, 344 U.S. 879; *Conner* v. *Deramus*, 374 F. Supp. 504, 507–509 (M.D. Pa.); but see *Galloway* v. *Beto*, 421 F. 2d 284, 288 n. 4 (C.A. 5), certiorari denied, 400 U.S. 912; *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860. Compare *United States* v. *Grasso*, C.A. 2, No. 76–1284, decided March 9, 1977, slip op. 2250–2251 (defendant implicitly objected to the declaration of a mistrial), with *id.* at 2263–2264 (dissent) (explicit objection is necessary, or consent to mistrial will be inferred).

[8] Indeed, once the district court had announced that petitioner is guilty beyond a reasonable doubt, its decision to dismiss the information was functionally the same as a decision to arrest judgment under Fed. R. Crim. P. 34. An order dismissing an information after verdict because of facial insufficiency would have been subject to appellate review under both the old Criminal Appeals Act (*United States* v. *Sisson*, 399 U.S. 267, 280–290) and the present one (*United States* v. *Wilson*, *supra*). If the order arresting judgment had been erroneous, the court of appeals could have reversed and remanded with instructions to enter judgment of conviction on the verdict. If, on the other hand, judgment had been properly arrested, a second trial could have been held (just as if the judgment of conviction had been reversed on appeal). See *United States* v. *Tateo*, *supra*, 377 U.S. at 465 (the Double Jeopardy Clause "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction"). Only the fact that the district court made its pronouncement of guilt before allowing closing argument makes this a mid-trial termination. In almost every other respect, however, it shares the attributes of a post-verdict arrest of judgment.

2. The same principles that apply to requests by the accused for mistrials also permit retrials after the accused has requested any other form of mid-trial termination

a. Function, not form, determines whether a second trial is permitted

It might be argued that the principle discussed in *Dinitz* does not apply when the first trial is ended by an order dismissing the indictment rather than by an order declaring a mistrial. We submit, however, that it makes no difference, for double jeopardy purposes, what form of mid-trial termination a defendant seeks. A "mistrial," a "dismissal of the indictment," or an "acquittal" by a judge in a jury trial all are based upon a perceived legal error in the institution or continuation of the proceedings rather than upon the resolution by the factfinder of any disputed fact in favor of the accused. A second trial therefore would not offer the prosecution the chance to do better with a second factfinder than it did with the first.

This Court has held on many occasions that function, not nomenclature, controls when double jeopardy interests are at stake. *United States* v. *Sisson,* 399 U.S. 267, 270, 279 n. 7; *United States* v. *Wilson, supra,* 420 U.S. at 335–339, 347–351; *Serfass* v. *United States, supra,* 420 U.S. at 392; *Breed* v. *Jones, supra,* 421 U.S. at 529. For purposes of the various policies that are to be served in the interpretation and application of the Double Jeopardy Clause, it makes no material difference what the name of or reason for the mid-trial termination may be. Thus, the permissibility of a retrial following a mid-trial dismissal should be assessed by the same standards that apply in the case of a termination by mistrial.

b. The interests of the accused in avoiding a second trial are the same whether the first trial ends in a mistrial or in an order dismissing the information

No matter why the first trial has ended, the most important fact relating to the permissibility of a second trial is that the accused has not received the verdict, on the facts, of the factfinder. When the accused has actively sought the mid-trial termination, however, he has—for reasons he persumably deems sufficient—abandoned his valued right to receive the verdict of the factfinder. This is so whether he seeks a mistrial or an order dismissing the indictment.[9] After

[9] We believe that the considerations discussed in this brief support a rule allowing second trials even when the district court has "acquitted" the defendant, in a jury trial, for reasons that go to the general issue of guilt or innocence. This case does not involve an "acquittal" on the merits, however, but instead concerns only an order dismissing the information as defective on its face. The Court therefore need not decide whether an "acquittal" on the merits—a decision that the accused is not criminally responsible—may be followed by a second trial when the "acquittal" is not embodied in a verdict by the factfinder. That issue is presented in the pending petition in *New York* v. *Brown*, No. 76–358.

all, the accused's request to terminate the trial expresses his willingness to forego receipt of a verdict. And there is no pressure on the accused to seek relief prior to verdict because—here, as in most such cases—he has the option to go to verdict and preserve his objections for post-verdict determination if he is not acquitted by the factfinder (see pages 24–25, *infra*).

As the Court explained in *United States* v. *Dinitz, supra,* 424 U.S. at 608, "when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." This is so when the defendant seeks to dismiss the indictment because of legal error no less than when he seeks a mistrial because of legal error. A defendant who concludes that his interests are best served by taking the case from the factfinder (and thereby avoiding any risk that he will be found guilty at that trial) should not later be

heard to complain when the prosecution makes a second effort to hold an error-free trial.

This focus upon the defendant's abandonment of his right to go to verdict at the first trial involves no diminution of the major protection afforded by the Double Jeopardy Clause—ensuring the interest of the accused in the finality of verdicts in his favor by the factfinder. See *United States* v. *Jenkins, supra.* An aborted trial produces no verdict of the factfinder in which the accused has an interest; it finds no disputed fact in favor of the accused; whatever the reason for a mid-trial termination, accordingly, it does not implicate the defendant's interest in the finality of a favorable verdict.[10]

c. A rule that distinguished among the reasons for the mid-trial termination would be inconsistent with the rule allowing a second trial after a verdict of guilty has been set aside

An important consideration, one stressed in *United States* v. *Jorn, supra,* is the fact that the goverment

[10] Many commentators have suggested that the guarantee that facts found in favor of the accused will not be subject to re-examination is the central meaning of the Double Jeopardy Clause, and that second trials therefore should be allowed when they would not produce a risk of depriving the accused of favorable factual findings. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262 (1965); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960). Other scholars, although not according such a central position to the protection of facts found in favor of the accused, have concluded that second trials should be permitted after mid-trial terminations, whatever the reason for the terminations. See Friedland, *Double Jeopardy* 69–72 (1969); Sigler, *Double Jeopardy* (1969).

cannot reasonably be required to marshal its resources to guarantee to every accused a single error-free proceeding on pain of inability to convict those guilty of crime. Errors are inevitable in the criminal process. Not all trials will go smoothly; not all informations or indictments will be drafted correctly. There is no reason why a drafting error should confer immunity from prosecution on all defendants prescient enough to wait until trial has begun to point out the error.[11]

It would be a topsy-turvy rule if the constitutionality of a second trial could be saved by the congruence of *two* errors. We agree with petitioner that the information was improperly drafted.[12] Yet if the district judge in the first trial had erred and rejected

[11] If the motion is made before trial, the court can pass upon the sufficiency of the indictment prior to the attachment of jeopardy. If the indictment is insufficient, the defendant can be reindicted. If a sufficient indictment is improperly dismissed, the government may obtain appellate review. *Serfass* v. *United States, supra.* In either event, only a single trial will be necessary. The problem presented by the mid-trial dismissal in this case never would have arisen if petitioner's counsel had drawn the defect in the information to the court's attention before trial.

[12] The Assimilative Crimes Act, under which petitioner was prosecuted, establishes "complete current conformity with the criminal laws of the respective States in which * * * [federal] enclaves are situated." *United States* v. *Sharpnack*, 355 U.S. 286, 293. Under Indiana law, the indictment or information charging a violation of Indiana Code 35–17–5–3, Burns Ind. Stat. Ann. 10–3030 (1975), must state that the defendant knowingly committed the theft with intent to deprive the victim of his property. *Linnemeier* v. *State*, 330 N.E. 2d 373, 376 (Ind. Ct. of App.); *Martin* v. *State*, 300 N.E. 2d 128, 131 (Ind. Ct. of App.); *Monroe* v. *State*, 339 N.E. 2d 102 (Ind. Ct. of App.). The information therefore should have alleged that petitioner committed the theft knowingly and with the intent to deprive Bilskie of his property permanently. *United States* v. *Debrow*, 346 U.S. 374, 376.

petitioner's challenge to the sufficiency of the information, petitioner could have been tried a second time after the error had been corrected on appeal (or by the district court after verdict). Petitioner's argument is that, because the district court ruled correctly and dismissed the information in his case, he cannot be retried, but that if the court had erred and denied the motion to dismiss he could have been retried. To state the proposition is to demonstrate its fallacy.

A defendant should not be allowed to transmute a drafting error into immunity from prosecution by the simple act of delaying, until trial has begun, the making of a motion to dismiss an indictment. The Double Jeopardy Clause is not a sword for defeating altogether the public interest in obtaining a trial of those accused of criminal misconduct. Accordingly, an accused who moves in mid-trial to dismiss the indictment, or to terminate the prosecution for any other reason, should be subject to a second trial if the termination is erroneous or if, as here, the error can be cured.[13]

[13] Several courts of appeals have agreed with this approach and have allowed second trials after mid-trial terminations at the request of the accused. These courts have held that it makes no difference whether the terminations are called mistrials or orders dismissing the indictments. See *United States* v. *Sanabria*, 548 F. 2d 1 (C.A. 1), petition for a writ of certiorari pending, No. 76–1040; *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (emphasizing the argument that an accused should not be allowed to obtain a tactical advantage by delaying a motion to dismiss until jeopardy has attached); *United States* v. *DiSilvio*, 520 F. 2d 247 (C.A. 3), certiorari denied, 423 U.S. 115 (holding that as a rule a motion in mid-trial to dismiss the indictment precludes any objection to a second trial). See also *United States* v. *Sedgwick*, 345 A. 2d 465 (D.C. App.), certiorari denied, 425 U.S. 966.

Other courts, however, have adopted a rule under which mid-trial terminations called "acquittals" or "dismissals of the indictment" prohibit second trials, but terminations called "mistrials" do not. See *United States* v. *Scott*, 544 F. 2d 903 (C.A. 6) (order dismissing the indictment because of preaccusation delay); *United States* v. *Lucido*, 517 F. 2d 1 (C.A. 6) (order terminating the prosecution in light of mid-trial suppression of critical evidence); *United States* v. *Means*, 513 F. 2d 1329 (C.A. 8) (order terminating the prosecution because of alleged prosecutorial misconduct and unwillingness to consent to 11-member jury); *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048 (order dismissing the indictment because the statute is unconstitutional as applied); cf. *United States* v. *Grasso*, *supra* (the Double Jeopardy Clause bars a second trial after judge terminated first trial by declaring a mistrial rather than by proceeding with the trial or granting defendant's motion for acquittal, where the defendant was not entitled to either acquittal or mistrial). For the reasons given in the text, we submit that these cases were wrongly decided.

The interests of defendants, no less than the interests of the public, are best served by a rule allowing second trials after the first trial has been terminated at the request of the accused. The Court pointed out in *United States* v. *Tateo, supra,* 377 U.S. at 466, that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." That consideration is pertinent to mid-trial

requests to dismiss the indictment no less than to requests to an appellate court to reverse a conviction. It is doubtful that a trial court would look as favorably as it should upon a defendant's request to terminate his trial if the judge knew that granting such a request would irrevocably end the prosecution. The judge would, instead, tend to proceed with the trial and leave the correction of errors to post-verdict proceedings or to appellate tribunals, after which second trials could be held. It would be ironic if the only way to comply with the Double Jeopardy Clause—which was designed to prevent repetitious litigation—were for district courts to hold or complete useless trials that could not end in valid verdicts. A trial judge should not be put in the quandary of holding what he and the accused agree is a useless trial in order to safeguard society's interest in prosecuting those accused of crime.

d. A defendant may safeguard his legitimate interests by going to verdict and saving his objections for post-verdict resolution

The rule that a defendant who does not object to a pre-verdict termination of his first trial should not be able to block a retrial on double jeopardy grounds does not impair the defendant's "valued right" to go to verdict at the first trial, and it does not subject his choice to pressure of any sort. Far from it; a defendant who desires to obtain the jury's verdict may do so simply by asking the judge to postpone his legal ruling until after verdict, thereby receiving an acquittal by the factfinder (if one is forthcoming).

This strategy will safeguard all of the defendant's interests. If he should be found guilty by the factfinder, he would be entitled to a post-verdict ruling on his claim of legal error—in the instant case, by means of a motion for arrest of judgment pursuant to Fed. R. Crim. P. 34. If there is error, the verdict would be set aside and a new trial would be held. If the defendant's assertion of error were incorrect, the district court (or an appellate court) would reject it, and the verdict would stand. If the assertion of error were incorrect, but the district court nevertheless found error, the court of appeals could rectify the district court's mistake without the need for holding a second trial. Following *Wilson, Jenkins,* and *Serfass,* many courts have reversed erroneous rulings in favor of defendants and reinstated verdicts of guilty.[14]

Saving legal issues for post-verdict decision preserves the accused's right to receive an acquittal by the factfinder at a single trial; it also minimizes his exposure to multiple trials by eliminating any significant chance that a retrial might be required by erroneous mid-trial terminations. If, disdaining the opportunity to receive the verdict of the factfinder, the accused seeks and receives a mid-trial termination, it is not unfair to hold a second trial.

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[14] See, *e.g.*, *United States* v. *Donahue*, 539 F. 2d 1131 (C.A. 8); *United States* v. *Burroughs*, 537 F. 2d 1156 (C.A. 4); *United States* v. *Cravero*, 530 F.2d 666 (C.A.5); *United States* v. *DeGarces*, 518 F. 2d 1156 (C.A. 2). Cf. *United States* v. *Finch*, C.A. 9, No. 75-2149, decided December 22, 1976 (reversing an "acquittal" after trial on stipulated facts).

In sum, neither the label of nor the reason for the order terminating the first trial prior to verdict should control the permissibility of a second trial under the Double Jeopardy Clause.[15] The expense, trauma and humiliation of the second trial are the same no matter why the first trial ended before verdict. The reason why the first trial ended may show that a second trial should not be held (if, for example, the statute is unconstitutional or does not apply to the conduct the accused is alleged to have committed, or if the judge correctly determines that the evidence cannot support a conviction), but those reasons are not based upon the Double Jeopardy Clause.[16]

[15] In England, the reason why the first trial ended is immaterial. Jeopardy does not "attach" until the jury returns a verdict, and second trials routinely are allowed after mid-trial terminations. See Friedland, *Double Jeopardy* 21–38 (1969). While serving other double jeopardy values, the English approach affords a defendant no protection of his interest in receiving the verdict of—and possible exoneration by—the factfinder at the first trial.

[16] We believe that this is what the Court was discussing in *United States* v. *Jenkins*, *supra*, 420 U.S. at 365 n. 7, which observed that it is important whether proceedings in the trial court terminate in a mistrial or in the defendant's favor. A "mistrial" usually is granted in contemplation of reprosecution. In *Jenkins*, on the other hand, the trial ended in a ruling on the general issue by the factfinder. The Court could not determine whether the factfinder had resolved certain factual issues against the defendant, and the judgment in that case therefore operated, in effect, as an absolute acquittal. The factfinder's judgment may have absolved the accused from criminal responsibility, and he had an interest in preserving the finality of that resolution. A trial that is aborted before verdict, however, does not entail any factual finding absolving the accused of criminal responsibility.

Petitioner's counsel asked for an order dismissing the information, and he received the relief he sought. That is enough to demonstrate that a second trial, on a proper charge, should be permitted. "Here, as in the mistrial context, [petitioner] elected to forego his valuable right to have his trial * * * concluded by the first tribunal. * * * [Petitioner] has not made, nor can he make, any suggestion that the government intentionally manipulated events to gain some advantage at the first trial or to force [petitioner] to forego his right to proceed before the first tribunal. * * * Since [petitioner] voluntarily requested termination of proceedings * * *, and since there can be no suggestion that [petitioner's] request was attributable to developments resulting from prosecutorial or judicial overreaching, * * * there is no double jeopardy bar to a [second] prosecution on this cause." *United States* v. *Sanabria*, 548 F. 2d 1, 7–8 (C.A. 1), petition for a writ of certiorari pending, No. 76–1040.

C. IT IS NOT DISPOSITIVE THAT THE DISTRICT COURT HEARD EVIDENCE AT THE FIRST TRIAL BEFORE DISMISSING THE INFORMATION

As should be clear from the foregoing discussion, we believe that the presence or absence of an objection by the defense to any pre-verdict termination of a trial is the critical factor in determining whether a second trial may be held. If the defense, having been afforded reasonable opportunity to do so, does not ask to receive the verdict of the tribunal then empaneled,

then it cannot reasonably be found that the defendant was deprived of his "valued right" to that verdict, a deprivation that would be the sole reason in logic or policy for precluding a second trial.

This approach by and large eliminates any reliance, in this case, upon the doctrine of "manifest necessity" that was the foundation for this Court's decision in *Illinois* v. *Somerville, supra.* The "manifest necessity" rule does not come into play unless the trial judge has overridden the defendant's preference for the tribunal then sitting; only a decision to terminate a trial despite the accused's desire to go to verdict must be justified by "manifest necessity." But petitioner did not assert such a desire, and his wishes were not disregarded.

Under the approach we have taken, application of the "manifest necessity" standard must reflect a sensitive regard for the factors that bear upon the fairness of depriving the defendant of his chance to terminate the contest by an acquittal at the first trial. In the hung jury cases, for example, manifest necessity is established because there is no reasonable possibility that the jury, being irrevocably deadlocked, would acquit the defendant. In other cases, where it cannot confidently be said that no verdict of acquittal is forthcoming, the courts must inquire into the availability of alternative means to purge the taint of the events precipitating the consideration of a mistrial. We think the inquiry also should encompass such factors as the degree to which actions of

the defense have brought about the crisis and the stage of trial at which the termination is being considered. See *United States* v. *Gentile,* 525 F. 2d 252, 255–258 (C.A. 2), certiorari denied, 425 U.S. 903.[17]

Illinois v. *Somerville, supra,* can be analyzed in these terms. Here, as in *Somerville,* a trial was terminated before verdict because of a defect on the face of the charge that made a valid conviction impossible. The trial in *Somerville* was terminated before any evidence had been taken. The termination took place over the defendant's objection, but the Court concluded that it was manifestly necessary to abort the trial because the "ends of public justice" (410 U.S. at 463) dictate that the parties to a criminal case and the courts need not be burdened by mounting a full trial that could not end in a valid judgment of conviction. We believe that it would make no difference whether the termination before verdict were called a mistrial (as in *Somerville*)

[17] For example, if a mistrial appears to be necessary because the defense has engaged in questionable conduct that has materially prejudiced the prosecution's prospect of obtaining a fair and impartial verdict, it obviously would not be improper to terminate the first trial whether or not the defendant objected to the termination. And a pre-verdict termination that occurs early in the trial (as in *United States* v. *Dinitz, supra,* and *Illinois* v. *Somerville, supra*) would constitute a less grave impairment of the defendant's "valued right" than would a termination at the close of the evidence following a three-month trial. Of course, a mistrial declared even at the very beginning of a trial may bar a second trial when, as in *Downum* v. *United States,* 372 U.S. 734, it is done to avoid a likely acquittal.

or an order dismissing the indictment (as in the present case). In either event the trial ended with the expectation that the defect in the charge would be corrected; a mistrial and an order dismissing the indictment are, in these circumstances, functionally equivalent, and it would be wholly insupportable to reach a different result because of the label the trial court placed upon its action. See, *e.g., United States* v. *Sisson, supra,* 399 U.S. at 270, 279 n. 7; *Serfass* v. *United States, supra,* 420 U.S. at 390–392.

Manifest necessity therefore would have supported the termination of petitioner's first trial—even over his objection—early in the trial. But once the evidence has been taken, there is little to weigh against the interest of a protesting defendant in receiving the verdict of the factfinder and, perhaps, being acquitted on the spot. There was manifest necessity in *Somerville* to avoid holding a useless trial; there would not, we believe, be manifest necessity to prevent a defendant from receiving a verdict once all of the evidence has been heard."[18]

[18] *Somerville* distinguished (410 U.S. at 464–465) *Downum* v. *United States*, 372 U.S. 734, upon which petitioner relies (Br. 17). *Downum* does not help petitioner. In *Downum* the prosecutor allowed jeopardy to attach on six counts of an indictment, knowing that a witness critical to two of the counts would not be present. The prosecutor then successfully obtained a mistrial with respect to all six counts, including the four counts for which no witness was missing. The Court held that this mistrial was not justified by manifest necessity. In the present case, however, the prosecutor did not allow jeopardy to attach although knowing of a flaw; unlike the case in *Downum*, there is here no prosecutorial overreaching. Nor did the prosecutor in the present case seek the termination of a trial on counts that were not infected with error.

It does not follow from this analysis, however, that petitioner's second trial violated the Double Jeopardy Clause because it was terminated after all of the evidence had been received.[19] Petitioner's trial was not terminated over his objection. In our view the complete answer to petitioner's arguments is that he had a right at the first trial to insist upon receiving a verdict after all of the evidence had been heard. He could have been acquitted, if the tribunal had been so disposed.[20] Petitioner's willingness to forego receiving the verdict of the factfinder justifies his second trial.

The district court's action in hearing evidence in petitioner's case was entirely reasonable. Petitioner did not object either to the taking of evidence or to the termination before formal verdict. The trial was underway. The prosecutor had made his opening statement. Although jeopardy technically had not "attached" because no evidence had been heard,[21] it would have been poor judicial administration for the judge to have stopped the trial in its tracks, *sua sponte,* while he researched a belated oral motion by defense counsel.

[19] Petitioner apparently agrees with much of the analysis we have presented above (Br. 22 n. 35).

[20] Indeed, it seems likely that the district court, were it disposed to acquit petitioner, would have terminated the trial—and the entire controversy—by a verdict of "not guilty" rather than by dismissing the information. It is plain from the record, however, that the court was not the least disposed to acquit petitioner (see A. 13).

[21] See *Serfass* v. *United States*, *supra*, 420 U.S. at 388; *Wade* v. *Hunter*, *supra*, 336 U.S. at 688.

The delay in ruling upon petitioner's motion to dismiss the information was caused primarily by the delay of petitioner's counsel in making the motion. It is one thing to say that a written motion made well in advance of trial should be passed upon before jeopardy attaches; it is quite another to say that a district court has an obligation to rule at once upon oral motions made in the course of trial. Motions to dismiss the indictment or information sometimes require substantial research and study; the trial judge in petitioner's first trial could not have known whether lengthy study would be needed here until he had halted the trial and looked at the state case that had been cited to him.

Petitioner has not offered any reason for his tardiness in making the motion. His counsel had been appointed approximately two months before trial, yet he did not make the motion to dismiss until the trial was under way. Moreover, counsel did not ask for a continuance of the trial and did not voice any objection to the taking of evidence. It is now too late for petitioner to argue that this taking of evidence—to which counsel did not object—was an error that bars the holding of a second trial. Petitioner's objection or request for a continuance would have offered the district court the opportunity to avert any of the hardship of which petitioner now complains. His failure to make this simple motion must be taken as acquiescence in the hearing of evidence until a convenient recess would allow the trial judge to do some brief research. Cf. *Francis* v. *Henderson*, 425 U.S. 536; *Estelle* v. *Williams*, 425 U.S. 501; *Davis* v. *United States*, 411 U.S. 233.

Petitioner's response to these arguments is twofold. First, he contends, an objection or request for a continuance would have been futile (Br. 23). Second, he argues, the district court should have ordered a recess *sua sponte* (Br. 20–23 and n. 34).

The argument that an objection or request for a continuance would have been futile is nothing but speculation. Cf. *Estelle* v. *Williams, supra.* Although the trial judge had tentatively denied the motion to dismiss the information, subject to further research (A. 9), the judge had not indicated unwillingness to halt the trial and do the research immediately. He was simply never asked to halt the trial, and therefore he never had an opportunity to express his views on the matter.

Petitioner's argument that the court should have interrupted the trial *sua sponte* fares no better. Every interruption of an ongoing trial subjects witnesses and the parties to inconvenience and delay. The witnesses in this case were in court waiting to testify, the prosecutor had made his opening statement, and for all the trial judge knew research on the motion would have been complicated and lengthy. Petitioner contends that this is not so, that it should have been evident that the information was defective. But if the information was patently defective, why did petitioner's counsel wait so long to make the motion to dismiss? If it must be assumed that the deficiency could be seen without the need for research, then it

also must be assumed that counsel delayed making the motion to dismiss in the hope that jeopardy would attach before the trial judge realized that the information was defective. And if this case is treated as one in which counsel delayed for the purpose of turning the shield of the Double Jeopardy Clause into a sword, then petitioner is in no position to argue that the trial judge made a fatal error by not dismissing the information at once or interrupting the trial to do research.[22]

The district court's decision to hear the evidence at petitioner's first trial cannot be characterized as judicial overreaching. It did not deprive petitioner of an opportunity to receive the verdict of the factfinder. Quite the contrary, evidence was received and, if the prosecution's case had been insufficient, the trial would have ended in an acquittal, on the facts, by the finder

[22] Petitioner also argues (Br. 20–21, 23–27) that the failure of the prosecutor to amend the information after its defect was called to his attention differentiates this case from *Somerville*. Petitioner, however, never asked for an amendment; he sought only outright dismissal. If petitioner had raised his objection to the information before trial, amendment would have been a simple matter. But the fact that the objection was made during the trial deprived the prosecutor of the opportunity to do research and recognize his error, just as it deprived the district court of the opportunity to do research. Although it doubtless would have been better practice to have amended the information once the trial judge had concluded that it was defective (see Fed. R. Crim. P. 7(e)), the prosecutor's failure to suggest this course, in the absence of a request by petitioner, violated neither the Double Jeopardy Clause nor the Due Process Clause. In light of the trial judge's belief (A. 13) that the prosecution had proved guilt beyond a reasonable doubt, the prosecutor's neglect to amend the information was much more harmful to the prosecution than it was to petitioner.

of facts. There was no unreasonable delay in passing on the motion; the entire trial took less than two hours, and the court passed upon petitioner's motion promptly after the first recess had given it the opportunity to do some research.

What happened at petitioner's first trial was certainly no worse than if the trial judge had erroneously adhered to his initial denial of the motion to dismiss the indictment. If the judge had erred, he would have entered a verdict, and the conviction would have been reversed on appeal. There still would have been two trials—but, in the interim between verdict and reversal, petitioner would have stood as a convicted man. It is hard to see how petitioner was harmed by the fact that the trial judge followed the correct course and dismissed the information.

Petitioner's final argument is that the district court should not have given the prosecution a full opportunity to see how the case would go and to improve upon its performance at a second trial (Br. 10–11). The prosecution would have had the same opportunity, however, if the district court erroneously had denied the motion to dismiss and the case had been reversed on appeal. Since the first trial could not have ended in a valid conviction, the district court's decision to take evidence effectively offered petitioner two chances to be acquitted while exposing him to only one risk of conviction. See *Ludwig* v. *Massachusetts*, 427 U.S. 618, 630–632, which upholds against a double jeopardy argument the Massachusetts system under which an accused may obtain a jury trial only by

standing trial twice. There, as here, the dual trial offered the accused a full preview of the prosecution's case and two chances to be acquitted.[23]

Moreover, if this concern were a genuine one in this case and not an afterthought, petitioner presumably would have objected to proceeding with a trial he knew could not result in a valid conviction. Whatever hardship petitioner might have experienced in standing trial twice is directly attributable to his untimeliness in making the motion to dismiss the information. But any hardship was not sufficiently weighty to persuade his counsel to move for a continuance or to object to the taking of evidence, and petitioner's interests here must accordingly be "subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter, supra,* 336 U.S. at 689. The Double Jeopardy Clause did not prohibit petitioner's second trial.[24]

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[23] The present case would perhaps be more difficult if the trial judge's delay in passing upon the motion to dismiss unnecessarily had afforded the prosecution a preview of petitioner's evidence. But petitioner presented no evidence at either trial, and the objections to a preview by the prosecution (which would be based largely on the Due Process Clause rather than the Double Jeopardy Clause) therefore are not presented here.

[24] Petitioner also contends (Br. 25–27) that his second trial violated the Due Process Clause. This adds nothing to the double jeopardy arguments. Multiple trials are held routinely in civil litigation (see, *e.g.*, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243), and it has never been thought that multiple trials are themselves offensive to anything in the Due Process Clause. Unless multiple trials are staged for the purpose of harassment, a circumstance lacking here, they do not violate the Due Process Clause. Cf. *North Carolina* v. *Pearce, supra; Allee* v. *Medrano*, 416 U.S. 802.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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PHILLIP JEROME LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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I.

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL.

The brief for the United States recognizes that the case at bar presents a different factual situation from previous cases in this Court in which retrial was

permitted after a motion for a mistrial, e.g., *United States v. Dinitz*, 424 U.S. 600 (1976); *Illinois v. Somerville*, 410 U.S. 458 (1973). In those cases, the trial court granted the mistrial as soon as the motion therefor was raised. Here, instead, although the motion to dismiss was made at the beginning of the trial, the court heard the entire evidence in the case before dismissing the action. The United States attempts to distinguish those cases on two levels. First, it says that petitioner was not prejudiced by the receipt of evidence before the motion was passed upon. Then, it argues that petitioner's trial counsel was largely responsible for any procedural deficiencies.

A. Barring petitioner's second trial is consistent with the policy objectives of the Double Jeopardy Clause.

The policy objectives of the Double Jeopardy Clause have already been stated in petitioner's principal brief—preventing prosecutorial abuse from multiple prosecutions;[1] protecting the defendant from the emotional, financial and social injuries caused by repeated exposure to the trauma of trial; safeguarding the defendant's right not to have his defense tactics previewed by the prosecution,[2] and his right to prevent

[1] Recent cases have been "focusing on the prohibition against multiple trials as the controlling constitutional principle." *United States v. Wilson*, 420 U.S. 332, 346 (1975), cited in *United States v. Martin Linen Supply Co.*, ____ U.S. ____, 45 USLW 4337, 4339 (1977).

[2] In fact, prior to the first trial, petitioner had originally indicated that he would call an alibi witness. At the trial, he decided not to call this witness, and instead the defense rested immediately after the conclusion of the prosecution's case. This defense strategy may have been valuable information for the prosecution's preparation for the second trial. (1st Tr. Trans. p. 67, App. p. 13).

the prosecution from having a dress rehearsal of the trial, complete with witnesses and defendant; and advancing basic notions of procedural fairness. The Government argues that the only additional interest of the defendant which the Double Jeopardy Clause might protect, in the situation at bar, as contrasted to the concededly allowed retrial following a defendant's successful appeal of his conviction, is the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The Government further argues that petitioner did not lose even this, since the trial court indicated its belief in petitioner's guilt. Petitioner has already suggested that this comment was a gratuitous *obiter dictum*, (Pet. Br. p. 18, n. 27). However, the respondent's argument overlooks the two parallel rights which were lost by the petitioner.

In addition to the right to have a verdict, another important objective of a defendant is to retain some measure of control over his trial.[3] The defendant does not want to sit through the anxiety of trial if he knows that it is procedurally so defective that it might as well be terminated immediately, in order to begin a proper, new trial. (Pet. Br. pp. 23-24).[4] Here, not only did

[3] "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error [requiring a motion for a mistrial]." *United States v. Dinitz*, 424 U.S. 600, 609 (1976).

[4] The brief for the United States recognizes this interest: "There is no point in requiring a defendant to endure the remainder of a trial that already (in his opinion) is so infected with error that a reversal and a second trial are bound to follow." (Res. Br. p. 14).

petitioner not have control over the stage at which his trial was terminated, but after sitting through the trial to the bitter end, notwithstanding an objection at the very beginning of the trial, he was then denied the benefit of an ultimate determination—the verdict was never pronounced.

B. Petitioner is not estopped from asserting his rights under the Double Jeopardy Clause.

The brief for the United States points to certain omissions by defense counsel at the first trial, which it is asserted should estop petitioner from contesting the unfairness of subjecting him to repetitive trials.

First, the Government suggests that defense counsel sought a tactical advantage by raising the deficiency in the information only on the day of trial, rather than by pre-trial motion. One can only speculate about trial counsel's motives. However, as respondent points out in its brief (Res. Br. p. 2), Mr. Swanson was petitioner's second appointed counsel, appointed seven weeks before the commencement of the trial. The original appointed counsel withdrew when he became associated in law practice with a U.S. Magistrate. Thus, it may be that the new counsel, receiving the case on the rebound, focused primarily on investigation and interviewing witnesses. He may simply not have had time, notice or compelling reason to examine the information in detail until the eve of trial. It may be that instead of seeking to hide the defense, to raise it only at trial, Mr. Swanson only noticed the defect shortly before the case was scheduled for trial. This Court certainly can take judicial notice of the heavy burden of many counsel

appointed in *in forma pauperis* cases, and of the simple reality that such counsel may be unable to devote the same attention to these cases as defense counsel to wealthier clients usually render. It bears emphasis that Mr. Swanson did raise the deficiency in the information at the very beginning of trial, before any evidence had been introduced. It would be far stronger evidence of a trial tactic if he had pointed out the deficiency only after the Government had put in its case and defense counsel had made the evaluation that the evidence was unfavorable to his client.[5]

Second, the Government argues that after the trial court declined to rule on the motion directed to the sufficiency of the information, the petitioner should have objected to continuing with the trial. We have already pointed out (Pet. Br. p. 23) that requiring the defendant to press such objections is utterly unrealistic, especially in a bench trial. It would hardly be good strategy to argue with the judge who has just made the ruling, when that same individual not only will control the entire flow of the case, but will also be the trier of fact.[6]

[5] Respondent does not challenge the timeliness of the motion objecting to the sufficiency of the information. Federal Rule of Criminal Procedure 12(b)(2) provides that "failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

[6] The Federal Rules of Criminal Procedure have expressly eliminated the requirement that a party make an exception to an adverse ruling of the court: "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ." Fed. R. Crim. P. 51.

Furthermore, an objection to the sufficiency of the information would seem to carry with it the implicit request that, if the court is unsure about the motion, it will grant a continuance to determine the information's sufficiency.

Instead of demanding that defense counsel have sole responsibility for objecting, it seems more appropriate to ask why the U.S. Attorney did not request a recess or move to amend the information[7] or why the judge did not order the recess *sua sponte*. The prosecution was obviously responsible for drafting the faulty information; therefore, it does not seem unfair to require it to bear the responsibility of requesting an opportunity to check its sufficiency, once the very defect is pointed out by the defendant. Since the record demonstrates that the deficiency was noticeable simply by comparing the information with the applicable statute, putting such a duty on the prosecution or the court could hardly be characterized as onerous.[8]

[7]If the prosecution had been so sure that the evidence after trial would point to guilt, it is curious that prior to the judge's ruling, the U.S. Attorney never availed himself of the opportunity given by Fed. R. Crim. P. 7(e), of moving to amend the information to cure the defect. The failure of the U.S. Attorney to make this motion may indicate that he preferred a second trial, at which time he would attempt to bolster his case. The argument of the United States (Res. Br. p. 34, n. 22) is once again an illustration of respondent's belief that the responsibility of securing an error-free trial falls principally on the defendant.

[8]The Government asserts that "the trial court in petitioner's first trial could not have known whether lengthy study would be needed here..." to determine if the information was defective. (Res. Br. p. 32). We have already noted the fact that the judge stated, when he ruled on the motion, that "[t]he briefest examination of the statute establishes [the defect]..." (Pet. Br. p. 21, n. 33). We have also noted that hindsight shows that the research took no more than a few minutes. But, even without the benefit of hindsight, it is fair to point out, as Judge Eschbach himself implied, that a first year criminal law course teaches that intent is always an element of theft. "[I]f a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course." (1st Tr. Trans. p. 68, App. p. 14). Thus, unlike an arcane rule of law, here the objection was fundamental enough that even an objection on the day of trial should have been more than sufficient.

The United States asserts that "[t]he argument that an objection or request for a continuance would have been futile is nothing but speculation." (Res. Br. p. 33). The United States also asserts that "it would have been poor judicial administration for the judge to have stopped the trial in its tracks" to research petitioner's motion (Res. Br. p. 31). Respondent can not have it both ways. If such a delay would have been unwise, then a motion by the petitioner would indeed have been futile, for it would have been expected that the trial judge would not grant that motion. If, on the other hand, the motion would have been granted, then it would have been equally appropriate for the judge to have granted the recess *sua sponte*, or for the prosecution to have made a request therefor.

Finally, the United States argues that the petitioner should have preserved the "valued right to have his trial completed by a particular tribunal," (*Wade v. Hunter*, 336 U.S. 684, 689 (1949)), by insisting that the trial court first render a verdict before ruling on the objection to the information. An examination of the trial record, however, will show that under the circumstances, requiring petitioner to make such a request would have been unreasonable. At the conclusion of the prosecution's evidence, defense counsel made a motion to dismiss the action for failure of evidence. The court denied the motion, while noting that this ruling did not apply to defendant's motion going to the sufficiency of the charge. After the defense rested without presenting evidence, the court then made its *obiter dictum* regarding petitioner's guilt. Immediately thereafter, it dismissed the action pursuant to the reserved motion. Petitioner's motion directed to the sufficiency of the information was not expres ly

renewed. Defense counsel had inadequate warning that he should affirmatively ask for a verdict, since at that point it was unclear that the verdict was not forthcoming and that the court was about to rule directly on the reserved motion.

II.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL.

Subjecting petitioner to a second trial, after an erroneous first trial, also violated petitioner's rights under the Due Process Clause of the Fifth Amendment. The United States argues (Res. Br. p. 36, n. 24) that the Due Process Clause "adds nothing to the double jeopardy arguments [because] [m]ultiple trials are held routinely in civil litigation . . . and it has never been thought that multiple trials are themselves offensive to anything in the Due Process Clause."[9]

The case at bar, however, involves more than a mere repetitive trial. The proceedings as a whole were grossly unfair towards the petitioner. Instead of safeguarding his rights, the prosecutor and trial judge subjected him to a needless, and useless, first trial, although a simple comparison of the information and the applicable statute would have shown that the conviction could never be sustained and that therefore further proceedings were futile.

[9] Interestingly, the United States concedes that there is such a difference in its brief in this Court in *Jeffers v. United States*, No. 75-1805: "[S]uccessive prosecutions that pass muster under the Double Jeopardy Clause might in some circumstances be so unfair as to violate due process. . . ." (At p. 14).

Although the limits of the Due Process Clause are sometimes difficult to determine, it is clear that its standards are violated when the process is unfair.

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).[10]

The cumulative errors in the first trial were such that, when the trial was terminated after all the evidence was taken but without any verdict being rendered, subjecting petitioner to a second trial violated his rights under the Due Process Clause.

III.

CONCLUSION

The basic defect in the respondent's position is that the United States would cast the principal burden for safeguarding the defendant's Constitutional rights on the defendant himself. The United States gives little consideration to the alternatives that were available both to the prosecution and to the judge, to insure that there would be a single fair trial. Because all parties failed in some measure to perform up to excellence, the United States would estop the petitioner from asserting the protections guaranteed him by the Fifth Amendment. We respectfully suggest that our system of justice creates a different balance. If the prosecution and the

[10] For an analysis of the Due Process Clause in a setting implicating double jeopardy considerations, see Mr. Justice Harlan's dissent in *Benton v. Maryland*, 395 U.S. 784, 809-813 (1969). Compare *Doyle v. Ohio*, 426 U.S. 610 (1976).

court act deficiently—as here, both in initiating the trial and in carrying it out—it is simply not enough to say that it is the defendant who ought to have done more to rescue them from their shortcomings, or who must pay the price. This Court has set a higher standard:

> A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. *Barker v. Wingo*, 407 U.S. 514, 527 (1972).

IV.

CORRECTION TO PETITIONER'S BRIEF

The Statement of the Case and the Summary of Argument in Petitioner's Brief may be read to suggest that petitioner's objection to the sufficiency of the information was made prior to the day of trial. To correct any possible misimpression, the second sentence in the second paragraph on page 3 should read: "On July 16, 1974, prior to the commencement of the evidentiary portion of the trial, ..." Similarly on page 4, the Summary of Argument should begin: "Prior to the commencement of the evidentiary portion of petitioner's first trial, ..."

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